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REPORTS

OF

CASES IN EQUITY,

ARGUED AND DETERMINED IN

THE SUPREME COURT

OF

NORTH CAROLINA,

EV.22 J

FROM JUNE TERM, 1838, TO DECEMBER TERM, 1839, BOTH INCLUSIVE.

BY THOMAS P. DEVEREUX and WM. H. BATTLE.

VOL. II.

SECOND EDITION.

WITH NOTES, REFERENCES AND CORRECTIONS,

BY HON. WM. H. BATTLE,

JUDGE OF THE SUPREME COURT OF NORTH CAROLINA.

FAYETTEVILLE:

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1860.

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JUDGES

OF THE

SUPREME COURT OF NORTH CAROLINA,

DURING THE PERIOD COMPRISED IN THIS VOLUME.

Hon. THOMAS RUFFIN, Chief Justice.
Hon. JOSEPH J. DANIEL.
Hon. WILLIAM GASTON.

ATTORNEY GENERAL,
JOHN R. J. DANIEL, Esq.

107994

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EQUITY CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NORTH CAROLINA.

JUNE TERM, 1838.

SAMUEL ALBEA *v.* WILLIAM GRIFFIN et al.

Although payment of the purchase-money, taking possession, and making improvements, will not entitle the vendee to the specific performance of a parol agreement for the sale of land, yet he has, in Equity, a right to an account of the purchase-money advanced, and the value of his improvements, deducting therefrom the annual value during his possession.

The case of *Baker* v. *Carson* (ante 1 vol. p. 381) approved.

This was a bill for the specific execution of a contract for the sale of a tract of land containing fifty acres. The defence was the act of 1819 avoiding parol contracts for the sale of land and slaves.

Upon the hearing the case was, that the ancestor of the defendants contracted to convey the land to the plaintiff, for $50, to be taken up in goods at the store of the plaintiff: that the goods were in part delivered: that the land was surveyed, and the plaintiff put in possession of it by the vendor: that he, the plaintiff, built a house upon it, and that the vendor gave him the assistance in raising it, which is usual between neighbors in the country. The vendor died without having executed a deed for the land, and it descended to the defendants.

Caldwell, for the plaintiff.

Burton, for the defendant.

Gaston, Judge, after stating the facts as above, proceeded:

[10] It is objected on the part of the defendants, that by our act of 1819 all parol contracts to convey land are void, and that no part performance can, in this State, take a parol contract out of the operation of that statute. We admit this objection to be well founded, and we hold as a consequence from it that the contract being void, not only its specific performance cannot be enforced, but that no action will lie in law or equity for damages because of non-performance. But we are nevertheless of opinion that the plaintiff has an equity which entitles him to relief, and that parol evidence is admissible for the purpose of shewing that equity. The plaintiff's labor and money have been expended on improving property which the ancestor of the defendants encouraged him to expect should become his own, and by the act of God, or by the caprice of the defendants, this expectation has been frustrated. The consequence is a loss to him and a gain to them. It is against conscience that they should be enriched by gains thus acquired to his injury. (*Baker and Wife* v. *Carson*, 1 Dev. & Bat. Eq. Rep. 381.) If they repudiate the contract, which they have a right to do, they must not take the improved property from the plaintiff without compensation for the additional value which these improvements have conferred upon the property.

The Court therefore directs that it be referred to the Clerk of this court, to inquire and report what is the additional value conferred on the land in question by the improvements of the plaintiff, and that he state an account between the parties, charging the plaintiff with a fair rent since the death of Andrew Griffin, and crediting him with what has been advanced towards payment for said land, and with the amount of the additional value so conferred upon it.

Per Curiam. Decree accordingly.

NOTE.—See the note to the case of *Baker* v. *Carson*, 1 Dev. & Bat. Eq. Rep. 381; and see also *Dunn* v. *Moore*, 3 Ired. Eq. Rep. 364; *Thomas* v. *Kyles*, 1 Jones' Eq. Rep. 302; *Love* v. *Neilson*, Ibid. 339. If the bill for a specific performance allege that the contract was evidenced by a memorandum in writing, which is not sustained by the proof, then the plaintiff cannot, under the prayer for general relief, obtain compensation for improvements upon the lands. *Smith* v. *Smith*, 1 Ired. Eq. Rep. 83. So it seems, that if the bill be for the specific execution of a parol contract, upon the ground of a part performance, and the an-

swer deny the contract altogether, instead of admitting it and relying upon the statute, the court will not grant the alternative relief claimed for improvements. *Dunn* v. *Moore, ubi supra.* Sometimes, under very peculiar circumstances, the court will not sustain a claim for improvements. *Carland* v. *Jones*, 2 Jones' Eq. Rep. 506.

The act of 1819 is contained in the Revised Code, ch. 50, sec. 11.

MARGARET MANNING *v.* THOMAS WOFF, Adm'r. [11]

Where a testator directed his property to be kept together, and his family supported out of it, under the government of his wife, and that no expenses should be charged to his children while they remained at home, and that his sons should in the final division of his estate account for expenses they might incur after leaving home to acquire professions, and that an equal division should be made when his youngest child attained full age—Held that a daughter who left the family after she attained full age, was not entitled to maintenance.

The dissent of the widow from the will of her husband, although it may defeat some arrangements made in the will, does not affect its construction.

The case made by the pleading was as follows: The late Moses Manning died in the year 1834, leaving a widow and nine children, all of whom were living. His three eldest children were sons who had arrived at full age, and were engaged in the exercise of professions and trades, for which their father had educated them. His two next children were daughters, both of whom attained 21 years since his death; the elder of these, Mary, was married, and the other, Margaret, the plaintiff, had, since her arrival at 21 years, resided with her sister. These were the testator's children by a former wife. Richard, the eldest child of the wife who survived him, was not of age, but had been sent abroad to learn a trade, and there were three children under age living with and under the government of their mother. Moses Manning duly made a will whereof he appointed his wife sole executrix. She renounced the office, and dissented from the provision made for her in the will as insufficient. The administration of the will was then granted to the defendant. The will, after giving some small specific legacies, and entering into details which do not bear upon the case, directed that the whole of the testator's estate should be

kept together as one joint stock until his son Thomas (the youngest child,) should arrive at 21 years of age, or during his wife's life or widowhood, and then to be equally divided between all his children: that in the division his three eldest sons should account, as for advancements, for all that had been expended on them after they left home to get professions, and until they reached 21 years, of which the testator left precise statements in his books, and that the same should be done with regard to what might be expended on his other sons after leaving home. The testator then directed that no expenses should be charged to any of his children while they remained at home; and further declared that he left the whole of
[12] his estate and the government of his family to his wife.

The bill stated that the plaintiff had left her mother-in-law, and gone to live with her sister; that she needed an annual allowance for her support, and that upon a fair construction of the will she was entitled to receive such out of the fund which the testator had directed to be kept together for future distribution. The administrator submitted, that after arrival at full age and leaving the widow's family, the plaintiff was not entitled to an allowance for maintenance.

Augustus Moore, for the plaintiff.

M. Haughton, for the defendant.

Gaston, Judge, after stating the case as above, proceeded as follows: It is plain, we think, that the "home" mentioned in the will is that household of which the testator was the head while living, and the government whereof he committed to his wife upon his death. We think also that the clause whereby the whole of his estate is left to her, must be interpreted as vesting her with the disposition of such part of its *income* during the period she remains head of the family, as is necessary for the benefit of the members that compose it. As to his sons, it is obvious that the testator did not contemplate them as continuing members of the family after reaching full age, and that he provided for an anticipation of their portion in case of leaving home at an earlier day. It is not so certain what he contemplated with respect to his daughters on their attaining full age;

whether he took it for granted that they would cease to be members of the family, or meant to leave them the option of still continuing such if they pleased. But the provision that his children shall be maintained, is expressly limited to the period during which they shall remain at home. When emancipated from its restraints they are no longer entitled to this privilege.

The dissent of the wife has necessarily broken in upon some of the arrangements in the will. But as the consequence of that dissent was but to obtain for her a provision in *addition* to what was given in the will, it cannot have the effect of changing the dispositions for the nurture, care and education of the children. All of the profits of the fund not wanted for this purpose must accumulate and fall into it, until the period of division arises.

The bill is dismissed—but it is a hard case, and is [13] therefore dismissed without costs.

PER CURIAM. Decree accordingly.

NOTE.—See the late case of *Harrison* v. *Bowe*, 3 Jones' Eq. Rep. 478, for the construction of a will providing for the maintenance of the illegitimate daughters of the testator.

The statute provides, that when a widow dissents from her husband's will, her share "shall be allotted to her in such manner as to create as little derangement of the provisions of the will as practicable." Rev. Code, ch. 118, sec. 12. This assumes that the construction of the will as to those provisions is not changed by the dissent, and it must be carried into effect according to the intention of the testator, except so far as the dissent of the widow may make it impracticable. See the late cases of *Adams* v. *Gillespie*, 2 Jones' Eq. Rep. 244, and *Holderby* v. *Walker*, 3 Jones' Eq. Rep. 46.

ROBERT McNAMARA, Adm'r of STEPHEN L. FERRAND, *v.* THOMAS IRWIN et al.

Where two parties claim distinct interests in a note, and one claim is admitted and the other disputed by the maker, and a judgment is entered up for the amount of the first, upon an agreement that the defence to the last shall be in no way prejudiced thereby, a court of equity will not permit an execution to issue for the disputed claim, until its merits have been settled.

Where an answer admits the equity of an injunction bill, but sets up an avoidance of it, the injunction will be continued until the hearing.

The bill in this case was filed by Robert McNamara against Thomas Irwin and Michael Irwin, co-partners in trade under the firm of Thomas Irwin & Co. (of New York;) Anthony W. Horton and George W. Hutton, of this State; and Albert Torrence, formerly also of this State, but who had recently removed therefrom, to enjoin further proceedings on an execution issued upon a judgment obtained by the said Thomas Irwin & Co. against the plaintiff as administrator of Stephen L. Ferrand, deceased.

The case made by the bill was, that Stephen L. Ferrand, the intestate of the plaintiff, at the request of the defendant Torrence, endorsed a note of the said Torrence for the sum of $5000, for the purpose of guaranteeing to Irwin & Co. certain acceptances made, or to be made, by them on account of said Torrence, and that a certain William E. Poe endorsed another note of said Torrence for the same sum, and executed for the same purpose; that Irwin & Co. sent these notes to this State and had suits instituted thereon for the purpose of recovering the amount of their advances, intended to be secured thereby; that the whole amount of all their advances was $3940 09; that judgments were rendered as well in the suit against Poe as in that against the plaintiff, for the entire amount of each note respectively, but with an agreement not to collect more than the sum due for their advances; that this agreement was testified in the suit with the present plaintiff by a document subscribed by the attorney of record of the plaintiffs in that suit, and filed among the records of the court, whereby it was declared that the note (on which judgment had been so obtained,) [14] with another note, had been deposited with them (the said plaintiffs) as a guarantee for sundry acceptances, as per account filed; that they claimed only the sum of $3940; that they would not sue out execution for more than that sum, and the interest to become due thereon, and the costs: that Hutton & Horton pretended that they had some claim for the balance of these notes, and that how this might be, was to be settled between *them* and the defendants, (meaning the defendants against whom judgments had been rendered:) that the plaintiffs, wishing to keep aloof from this controversy, would lend no aid to either party therein; that if the defence against

the claim of Hutton & Horton was improper at law, and not in equity, the judgment should not prejudice such defence, and if necessary, upon payment of so much thereof as should be due the plaintiffs, a new trial should be granted, the plaintiffs in no event to be liable for the costs of litigation. The bill then charged that Irwin & Co. had been fully paid off, (the one half by the plaintiff and the other half by Poe,) all they claimed as due for interest and cost, but nevertheless an execution had been sued out to collect the residue of the judgment from the plaintiff, with an endorsement on the said execution that it was issued for the use of Hutton & Horton.

The defendants Hutton & Horton, by their answer denied that the note endorsed by the plaintiff's intestate was so endorsed for the purpose of guaranteeing advances made or to be made to Torrence by Irwin & Co., but averred that Torrence had purchased out the interest of these defendants in the late firm of Hutton, Horton & Co., and upon such purchase bound himself to pay them the sum of $3000, and to pay off all the debts of the said late firm, and to save them from liability or injury therefor; but it was further stipulated upon the contract of purchase, that for the purpose of more speedily accomplishing the payment of the debts of said firm, and relieving these defendants from responsibility thereupon, Torrence should put into their hands four notes amounting together to the sum of $15,000, with sufficient endorsers, to be by these defendants negotiated or collected for the purpose of discharging those debts, and also of paying them the $3000 due for the said purchase; that the two notes mentioned in the bill, [15] with two others, one for $3000 endorsed by William McKay, and one for $2000 endorsed by William E. Poe, were delivered to the defendants in pursuance of said agreement; that all of the said notes were transferred by them to Irwin & Co., in order to guarantee to them such advances as they might make at the request of these defendants: that advances were made by Irwin & Co. to the amount of $9,000, all of which were faithfully applied by the defendants to the discharge of the debts of the late firm of Hutton, Horton & Co.; that the notes of $3000 and $2000 were paid up in full to Irwin & Co., which left a balance due them of between $3000 and $4000, to

collect which balance suits were brought by Irwin & Co. against the plaintiff as administrator of Ferrand, the endorser of one note, and William E. Poe, the endorser on the other unpaid note; and judgments were recovered respectively in said suits for the full amount, principal and interest of each note. The answer then averred that before the commencement of said suits, these defendants had taken up and paid off, with their own funds, debts of Hutton, Horton & Co., which Torrence was bound to have discharged, and which were intended to be secured by the said notes, to the amount of $1843 50, which, with the interest thereon, they were justly entitled to collect out of the said endorsers. These defendants admitted that Irwin & Co. had collected from the plaintiff and William E. Poe the entire balance due them for their advances, but insisted that the sum aforesaid so due *them*, and for which the said notes were, and the judgments thereon are securities, remained wholly unpaid. They denied that the agreement of Irwin & Co., set forth in the bill, was intended to discharge the plaintiff from liability to these defendants on account of the judgment; but was a mere memorandum to show "that the said Thomas Irwin & Co. only claimed in their own right, by virtue of said judgments, the amount for which they severally sued out their executions, it being for about the sum of $2000, against the plaintiff as administrator of T. L. Ferrand, whereas by the agreement referred to, according to the plaintiff's own showing, *they were* authorized to collect the rise of $3,900. The defendants averred that after Irwin & Co. had collected
[16] what was due them, they, in pursuance of the agreement upon which the notes had been transferred, assigned over the said judgments to these defendants for the benefit of the creditors of the late firm of Hutton, Horton & Co., a copy of which assignment was annexed to their answer. They further insisted, that if the "memorandum" before referred to could have any operation against their claim, that the plaintiff had full notice of that claim, and abundant time to make defence against it, and having altogether neglected to make any defence, his application for an injunction should be regarded as a mere effort to delay the payment of a just debt.

Irwin & Co. by their answer also denied that the notes in q es-

tion were received by them from Torrence, but declared that the same were placed with them by Hutton & Horton, as a guarantee for the payment of moneys advanced by these defendants to Hutton & Horton for the benefit of the late firm of Hutton, Horton & Co., and upon an agreement to be returned as soon as the amount of said moneys should be collected or refunded. They stated the amount of their advances, and of their collections, and the balance due them, and their sending on the two unpaid notes to be put in suit, and the judgments obtained thereon, as was set forth in the answer of their co-defendants; admitted the making of the agreement by their attorney on getting judgments as charged in the bill, and their having obtained full satisfaction for all their advances; insisted that they had a right to assign the judgments to Hutton & Horton; declared that they have done so; and contended that the true meaning of the memorandum or agreement was that the plaintiff should have a reasonable time to make good his defence to any other claim that might arise on the judgment against him, and this he had been allowed most amply. These defendants denied that they have collected out of the plaintiff the full amount for which they had a right to sue out execution against him, as by the terms of the agreement they were to be allowed to sue out execution for $3,940 and upwards, and they have collected from the plaintiff only the sum of $2000.

As to Torrence, the bill was taken *pro confesso*. On the last circuit, his Honor Judge Bailey dissolved the injunction, and the plaintiff prayed an appeal, which was allowed. [17]

Iredell and *Caldwell*, for the plaintiffs.

W. H. Haywood, for the defendants.

Gaston, Judge, after stating the pleadings as above set forth, proceeded: The last ground of defence taken in this answer, which has been also, but not so distinctly, urged in the answer of Hutton & Horton, may be promptly disposed of. The agreement that gives rise to the present controversy was avowedly made in relation to both the judgments. According to that agreement, the plaintiffs in the judgments were to be at liberty to sue forth an execution upon *either* of them, for the *whole* of the sum ascertained to be due, but they were not to collect

from *both* of them more than the sum truly due. The resort to a defence so disingenuous is calculated to hurt the cause that adopts it—but we will consider the main defence relied upon, altogether unprejudiced thereby.

The real dispute in this case is between the estate of the deceased Stephen L. Ferrand, represented by the plaintiff, on the one hand, and the defendants Hutton & Horton on the other. Irwin & Co. set up no claim to the money in dispute, and Torrence is insolvent. And the dispute is not what shall be *finally* decreed between these parties upon the hearing, but what is the proper disposition of the subject until a hearing of the cause can be had. The decision of this question depends upon the proper construction of the agreement so often referred to, and the established usages of courts of equity.

There is no pretence that the highly respectable professional gentleman (Mr. Henry) who subscribed that agreement, either transcended his authority or acted without the full approbation of his clients. Hutton & Horton do not complain that this agreement was made in violation or in fraud of their rights, unless it should be construed to have intended a *release* of *their* demands. They were on the spot where the suits were prosecuted, and the suits were instituted as they say at their request. It can scarcely be doubted but that they were privy to the agreement, and assented thereto. But however this may be, it was known to the attorney of the plaintiffs in the suits when
[18] the agreement was entered into, that they set up some claim under, or upon the notes, which was not admitted by the endorsers, and it was his purpose—that of those whom he represented, and of the defendants in the suits—that in the rendition of the judgments this claim should not be passed upon. Nothing in regard to its validity or invalidity was to be determined thereby. Unquestionably the defendants Hutton & Horton are right in insisting, that by the agreement it was not intended to release, surrender or discharge their claim. The judgments were severally taken for the full amount of principal and interest of each note, not only to secure the payment to the plaintiffs of the part thereof which by the agreement was shown to be due to *them*, but to stand also as securities for any other person who had claims founded on the notes. It is con-

tended by the defendants Hutton & Horton, that they are entitled to have the benefit of these securities, because of advances made upon the faith of these notes, to the amount of $1843 50, and if this allegation of theirs be established, they will have a right in the name of Irwin & Co. to collect that amount upon these judgments. They would have had this right without an assignment, and as that transfers no legal interest, they have this right and no more under the assignment. Irwin & Co. are still the legal proprietors of these judgments, and this court will hold them to be trustees thereof for those beneficially entitled to the uncollected moneys thereon. But certainly, upon a fair construction of the agreement, it must first be established that the claim of Hutton & Horton is well founded, before they are entitled to any control over the judgments. When these were rendered, the claim was characterized as a pretension which, whether true or false, was wholly unknown to those in whose favor the judgments were rendered, and upon the truth or falsehood of which *they* were not to determine. From the controversy in regard to this claim *they* were to keep aloof, and in its prosecution *they* were to be wholly neutral. The claim was to be settled between the parties averring and contesting it—amicably if they could; by a resort to the courts of justice if they could not. To arm one of these parties with the power of collecting all that is demanded from the other, before any settlement of the controversy—to give [19] him this decided advantage in the beginning of the judicial contest—would be to observe a singular sort of neutrality. While the agreement stands this cannot be permitted.

The defendants in this case seek to put an absurd construction upon the agreement, when they insist that the endorsers were to have time by it to *disprove* the claim. It is according to the ordinary notions of justice that a disputed claim should be proved. Until it is *prima facie* established, defence against it is not to be asked. Where, how and before whom is the claim to be disproved? The agreement shows, that unless the parties came to an amicable arrangement, the claim was to be proved, and if the judgments produced difficulties in opposing it, the judgments themselves should be set aside, and new trials allowed, so as to leave the controversy one entirely new.

The usages of the court are consistent with the course which the agreement indicates as proper to observe. The equity of the bill in substance is, that the note in this case was received by the plaintiffs at law only as a security for their advances, and these have been paid. This equity is not denied. The plaintiffs at law admit that *they* have no right to the money sought to be collected. But a new claim is introduced in behalf of persons not parties to the judgment, who pray to have the benefit of it, to secure a demand which has never yet been passed upon by any tribunal. It may be that this claim is just, and therefore it is right that an opportunity should be afforded to show it. But *non constat* that it is just. The oath of the defendants shows no more than that they so believe, and it is not an oath responsive to or denying any of the allegations in the bill. It is the settled rule, that when the equity of a bill is not denied by the answer, but a new equity is thereby introduced to repel or avoid it—the injunction will not be dissolved by such an answer, but shall be continued until the hearing of the cause. It is the opinion of this court, that the interlocutory order dissolving the injunction in this cause was erroneous, and that the said injunction ought to have been continued until the final hearing of the cause. A certificate to this effect must be forwarded to the court of equity
[20] for the county of Rowan, with instructions to proceed accordingly.

PER CURIAM. Decree reversed.

NOTE.—The rule that when an answer admits the equity of an injunction bill, but sets up a new matter in avoidance, the injunction must be continued until the hearing, is well settled. See *Lyrely* v. *Wheeler*, 3 Ired. Eq. Rep. 170; *Kerns* v. *Chambers*, Ibid. 576; *Strong* v. *Menzies*, 6 Ired. Eq. Rep. 544; *Deaver* v. *Erwin*, 7 Ired. Eq. Rep. 250; *Wilson* v. *Mace*, 2 Jones' Eq. Rep. 5.

OSTEN BRADSHAW et Ux. *v.* JAMES ELLIS et al.

Two different tracts of land a half mile apart, which were cultivated by a testator together, as one farm, will both pass by his will, under the description of "my plantation."

Where a testator directed all his property to remain on his plantation, under

the care of his wife, until his youngest son should attain full age; and then gave the plantation to that son and another, the wife takes by implication a term in the plantation during that period.

Crops growing on land not devised, go to the executor and not to the heir.

Anderson Ellis died possessed of one hundred slaves, and three separate tracts of land, each of which he cultivated. One tract, on which he resided, contained 565 acres; another, called the Kelly tract, containing 800 acres, was half a mile distant from that first mentioned, but was cultivated with it as one farm; the third, called the Mill tract, was several miles distant from the two others, and contained 2700 acres.

By his will, after giving several slaves to two of his daughters, with a direction that they should be estimated in the division of his personal estate, he proceeded as follows:

"It is my will that my family live together, and that all the property not devised, to remain on my plantation in the care of my beloved wife Judith Ellis, to be managed to the best advantage until my son William Anderson shall arrive at full age, at which time I wish all my personal estate, consisting of negroes, horses, cattle, hogs, and sheep, farming utensils and all other personal estate, divided equally among the following legatees, to-wit: my wife Judith Ellis, Elizabeth Pearson, Maria Ellis, Lucy, John, Sarah, Mary and William Anderson Ellis, so as to make them all equal in my personal estate, but if my wife should die before my son William Anderson arrives at full age, then the property to be divided as soon as can be.

"I give to my sons John and William Anderson Ellis, on William Anderson arriving at full age, my tract of land which I purchased of Elizabeth M. Kelly, containing about eight hundred acres, to be equally divided between them both, to them and to their heirs forever, but should either of them die without issue, then the surviving brother to heir all the [21] Kelly tract.

"I give to my beloved wife Judith Ellis, during her natural life, one-third part of the tract of land whereon I now live, supposed to contain 565 acres, her part to include my mansion house, all other buildings, also the spring, also the following negroes, to-wit: Dice, &c. It is my will that my executor sell the whole of my mill lands, supposed to contain 2700 acres, on

a credit, for the best price that can be obtained, the money arising from said sale to be equally divided between my daughters Harriet Bradshaw, Elizabeth Pearson, Maria, Lucy, Sarah and Mary; but if said land cannot be sold for something like a fair price, then my executor is to pay (as soon as it can be made by the crops which may hereafter be raised,) to Elizabeth Pearson the sum of $2000, which is to be in full of her part of the said land, and whenever said land can be sold, the proceeds thereof to be equally divided between my other daughters, to-wit: Harriet Bradshaw, Maria, Lucy, Sarah and Mary Ellis.

"I will that my executor sell my tract of land whereon I now live, after the death of my wife, either privately or at public sale, for the highest price, the money arising from said sale to be equally divided between the following children, to-wit: Elizabeth Pearson, Maria, Lucy, Sarah and Mary Ellis."

The plaintiffs, one of whom was the daughter of the testator mentioned in the will as Harriet Bradshaw, contended that the testator died intestate as to two thirds of the first mentioned tract of land, which descended to his heirs until the death of his wife—that his heirs were entitled to a division thereof, and to immediate possession of two-thirds of it, and to an account of two-thirds of the rent and profits thereof since his death. They also contended that the second tract of land above mentioned descended to the heirs of the testator, until William, the testator's youngest son, should attain his full age; and they prayed for an account of the rents and profits of that; and further they insisted that the growing crop upon the mill tract belonged to the heirs. They alleged that the executor and
[22] the widow had received all the above mentioned rents, issues and profits. The executor, the widow, and the other children of the testator, were the defendants, and the only questions were as to the proper construction of the above recited clauses of the will.

J. T. Morehead, for the plaintiffs.

Caldwell, contra.

Daniel, Judge.—After examining the whole will, we are of opinion, that the testator did not mean, by the words "*my* plan-

tation," to confine the care of his wife only to the home tract of 565 acres; but that he designed to embrace under this designation the two tracts which he cultivated together as one farm. It seems to us, that a chattel interest in the other two tracts of land passed to the widow, as trustee for the children named in the will, until William should come of age, or until the death of the widow, if that event should happen before William came of age. That this construction is right, is fortified by the fact, that the testator, when devising his lands in other parts of his will, does not make use of the word "plantation," but he uses the words "tract of land." Again, he devises his Kelly tract of land to his two sons John and William, on William's attaining full age; shewing his intention that it (the Kelly tract) should go to some other person until that period arrived. If no other person could be designated, by implication plain in the will, to take, then the heirs at law would take. But the testator does say, all the property not devised is to remain in the care of his wife, to be managed by her until William shall come of age. If the words are not express, the implication is plain, that the wife should take the Kelly tract. When William shall come of age, the chattel interest of his mother (if she then be alive) will cease, and John and William will be entitled to the p ssession of the Kelly tract. The two tracts, viz: the home tract and the Kelly tract, pass to the widow under the words "my plantation."

The *second* question raised by the bill has been decided by the court, in giving the opinion on the *first* question. "I give to my sons John and William A. Ellis, on William A. Ellis arriving at full age, my tract of land which I purchased of Mrs. Kelly, &c." Does this tract of land descend to [23] the heirs at law, until William arrives at age? We have before said that the widow has a chattel interest in this tract. If the widow should die before William comes of age, who would be entitled to take the Kelly tract from her death unto the time of William's coming of age, is a question not necessary now to be answered. The heirs at law, as such, at present have no vested rights in this tract of land.

The *third* que tion submitted, did the emblements which were on the mill tract of land, at the death of the testator, go

to the persons who were to have the proceeds of the sale of the said tract. The clause in the will is as follows: "It is my will that my executor sell the whole of my mill lands, on a credit, for the best price that can be obtained, the money arising from said sale to be equally divided between my daughters, &c." The mill tract is not devised to the daughters, nor to the executor to sell. The executor has only a naked power to sell and divide the money produced by the sale of the land, and not the crop growing on the land at the death of the testator. The mill land *descended* to the heirs at law, subject to the power in the executor to sell. The emblements on lands which descend to the heir, belong to the executor, and are personal assets. We therefore declare, that no part of the emblements which were on the mill tract the year the testator died, belong to the plaintiffs under this clause in the will. As to the remaining question, which respects two-thirds of the home tract, if Mrs. Ellis shall be alive when William arrives at full age, then she by the will becomes entitled to but one-third of that tract of land for her life. The other two-thirds not having been disposed of by the will, then will go to the heirs at law until the death of the widow. On her death, the executor has a power to sell this tract, and divide the money among the daughters mentioned. The plaintiffs at present are not entitled to any of the demands set forth in their bill—therefore the bill must be dismissed.

PER CURIAM. . . . . Bill dismissed.

NOTE.—In favor of the construction upon the main question, see the cases of *Bolick* v. *Bolick*, 1 Ired. Rep. 244; *Stowe* v. *Davis*, 10 Ired. Rep. 431; *Woods* v. *Woods*, 2 Jones' Eq. 420. Although the rule was, that crops growing on the land at the death of the owner would, when it was not devised, go to the executor instead of the heirs, yet if the land were devised, they would go to the devisee instead of the executor. That is now altered by the Revised Code, ch. 46, sec. 63, which enacts, that "the crops of every person, remaining ungathered at his death, shall in all cases belong to the executor or administrator as part of the personal assets, and shall not pass to the widow with the land assigned for dower, nor to the devisee of the land by a devise of the land to him, but only when such intent shall be manifest and expressed in the will."

As to the estate which a widow may take by implication, under her husband's will, see *Carter* v. *Williams*, 8 Ired. Eq. Rep. 177.

ALFRED M. SLADE *v.* ELISHA R. RHODES et al. [24]

An agreement whereby an agent is constituted to recover property by legal process, and is to receive one-half for his compensation, is infected with champerty, and will not be aided in equity. And upon a subsequent contract for the sale of the interest of the principal to the agent, it must appear that the agency was at an end when it was made, and that the agent had in all things acted with good faith, before assistance will be rendered to him.

This bill set forth, that on the 31st of December 1819, one William D. Taylor, the husband of Nancy Taylor, formerly Nancy Monk, conveyed to John West in trust for the separate use of the said Nancy, one undivided half of the personal property and choses in action, which they were entitled to receive under the will of her father Thomas Monk, deceased: that the said Thomas Monk, who died in the year before, had bequeathed all his property to his five children, viz: the said Nancy, Sally, Maria, Joseph and Martha: that Martha having died soon after her father, and a division of the negroes that were left by the said Thomas having been undertaken to be made on the day preceding the execution of the conveyance by Taylor to West, there had been set apart, as the share of Taylor and wife, one fourth part of the said negroes, thus including not only the fifth directly bequeathed to Taylor's wife by her father, but also the fourth of a fifth which accrued to her as the next of kin of her deceased sister: that a division was made of the negroes thus allotted to Taylor's wife, between the said Taylor and the said West, and that the latter, from the time of that division, and up to the time of filing the bill, in February 1822, had continually held the negroes delivered over to him in that division, as being conveyed by the said deed, for the separate use of the said Nancy. The bill further stated, that Thomas Monk, at the time of his death, had, under the will of Thomas Spiller, a vested remainder in certain other slaves, subject to an estate for life in one Mary Sherrod, which remainder passed by the general bequest in his will to his said five children: that the said Mary died in the year 1824: that Joseph Monk, one of the five children of Thomas Monk, died in the same year: that

a petition was then filed in behalf of the said Nancy Taylor and the two other surviving children of her father, Sal-
[25] ly and Maria, for the purpose of dividing the slaves in which Mary Sherrod had held a life-estate: that the commissioners appointed under this petition put into a common or joint stock not only these slaves, but those which had been allotted to Joseph Monk in the former division of 1819, and on the 27th of December 1824, divided the whole into three shares, of which one-third was then allotted to Nancy Taylor, and taken into possession by her said trustee, and the same had ever since been retained by him, and his representatives after his death, until the last of the year 1829, and the beginning of the year 1830, when negroes Harry, Matilda and Rebecca came to the possession of the plaintiff. The bill stated that John West died in 1829, and William Taylor in 1831: that Kenneth West first administered on the estate of the said John, and after his death the defendant Elisha R. Rhodes; and that the defendant Martin B. Ballard intermarried with Nancy Taylor, the widow of the said William Taylor, and has been appointed his administrator. The plaintiff then set forth, that in August 1829 he had been appointed by the said William an agent to sue for and recover whatever money or other property was due to him by reason of his marriage with Nancy Monk: that acting under this authority, he got into his possession the negroes Harry, Matilda and Rebecca, and retained them, believing that if he had not strictly a legal title, he was in equity entitled to them, or to their value: that on the 11th of May 1830, a new contract was made between him and the said Taylor, by which, for the valuable consideration of $500, Taylor assigned to the plaintiff all his estate in and to the negroes, naming them, which were allotted to the said Taylor's wife in *the division* of 1824. The plaintiff then complained that in the division of 1819, the one-fourth of Martha's share of the negroes whereof Thomas Monk died possessed, had been subdivided between Taylor and West, the trustee of Taylor's wife, as personal property to which they were entitled under the will of said Thomas, whereas that fourth was not subject to Taylor's deed, inasmuch as it accrued to the said Taylor and wife as her distributive share of the said Martha's personal estate: he also complained that the said West,

under the division of 1824, received the whole of Joseph Monk's share of his father's negroes under the first divi- [26] sion of 1819, to *no* part whereof was he entitled under Taylor's conveyance, and that he received a third instead of a sixth of the negroes which belonged to her father at his death, subject to the then outstanding estate. The bill then charged that suit at law had been brought against him by Rhodes, the administrator of West, for the negroes Harry, Matilda and Rebecca; averred that these negroes are of less value than the *excess* improperly received and retained by West under the division of 1824; prayed for an injunction to restrain that suit; and for a proper division between himself and the defendants, of the negroes allotted to West in that division, or for compensation in money because of his right to a part thereof. The defendant Elisha R. Rhodes averred, that John West in the bill named, and his representatives, held the slaves delivered over to him in 1819 under a division with Taylor, continually thereafter, and held those allotted to the said West in the division of 1824 continually thereafter, with the exception, as to those last mentioned, of the three slaves Harry, Matilda and Rebecca, which he alleged were, at the times stated in the bill, clandestinely seduced away, or forcibly taken into the possession of the plaintiff, for the sole and exclusive use of Nancy Taylor, as though she were a feme sole, and adversely to the said William Taylor, her late husband, and all other persons, and insisted upon such length of possession as a bar to the claim now pretended, under the act of 1715 for limitation of actions, and the act of 1820 for quieting the title of persons in possession of slaves; declared his personal ignorance of the other matters charged in the bill, and put the plaintiff to the proof thereof, and especially and peremptorily denied that the plaintiff ever purchased Taylor's interest in the premises, or paid any consideration whatever therefor. The defendants Ballard and wife denied that the pretended contract of purchase between the plaintiff and the said Taylor was made for any valuable consideration, and insisted that if in truth it were so made, it transferred only such interest as Taylor then had, that is to say, a right to reduce into possession during the coverture, these his wife's choses in actions, or to have them if he survived his wife.

[27] Replication being taken to these answers, the parties proceeded to their proofs. It is unnecessary to notice these except so far as they bear upon one allegation in the bill, put in issue by the answers, and essential to the establishment of the plaintiff's case, viz: the assignment by Taylor to the plaintiff for a fair and valuable consideration.

In support of this the plaintiff produced the instrument, executed by Taylor, attested by John E. Wood, as subscribing witness, dated the 11th of May 1830, and proved at May term 1830 of Bertie court. It recited a consideration of $500, paid by the plaintiff to Taylor, but the subscribing witness, who testified that he either saw it executed, or heard it acknowledged, declared that he saw no money paid, and was silent as to any security having been given to Taylor for the payment thereof. He testified, however, that at the time of the execution Taylor was sober, and, as appeared to him, in his senses. The plaintiff further exhibited a sealed note in his own handwriting, without witness or date, whereby he promised on demand to pay Taylor $250, but with an express condition that "this note is not negotiable." On this was endorsed, in the plaintiff's handwriting, a credit for $38 45, of the 13th of July 1830. He also exhibited an instrument under seal, from Taylor to the plaintiff, of the 21st of August 1829, unattested, but acknowledged by Taylor in open court, at the same term when the alleged assignment was proved, whereby Taylor authorized the plaintiff, in his name, and in the name of Taylor's wife, to ask, sue for and recover, from any persons having possession thereof, such sums of money, real or personal estate, which the said Taylor derived by marriage with his said wife, and declaring that the one half that may be recovered by the said plaintiff should be applied to *his* sole and proper use, and the other half to the use of the said Taylor, and that the said power should be irrevocable, provided that the plaintiff should proceed forthwith to reduce the said property into possession. He relied also on the deposition of Figuras Lowe, a brother-in-law of Taylor, who stated that Taylor told him in 1827, he thinks, (probably a mistake as to the year,) that he had made a power of attorney to the plaintiff to sue for Taylor's property; that in May 1830, Taylor wanted witness to go with him to

Windsor to meet Slade, who, Taylor said, had agreed to [28] buy the title, and take an assignment; that witness furnished Taylor with a horse and gig, but did not accompany him; that Taylor went off sober, and that witness saw him on Thursday of the said week in Edgecombe county, at a cock-fight, where Taylor told him that he had assigned his right to Slade, who had paid him *some* money, and given his note for the residue of the price. What was the price, or what part was paid, Taylor did not tell the witness, and at that time Taylor was sober.

A mass of testimony was taken on both sides in regard to Taylor's capacity and habits. There was much discrepancy among the witnesses, but the result of the whole *clearly* established, that he was originally of sufficient, but not above ordinary capacity; that when a boy he became addicted to intoxication; that for many years before his death he became a notorious and habitual drunkard; that he and his wife separated from each other before 1819, and lived apart ever afterwards; that he had no fixed habitation, and no apparent property, staying sometimes with his brother, and at other times where his brother boarded him, and relying on his brother for the supply of his wants; that he was vexed with his wife, and was anxious and offered to sell or give away the claim which he understood that he had to property in the possession of her trustee, in order to spite her; that he was reckless of his interest, and confided blindly in those whom he supposed his friends; that after the alleged purchase of the plaintiff he seemed as destitute of means as before; that his habits of drunkenness became more inveterate than before, and his understanding sunk more and more under them, as he approached his end; that he died in October 1830, a victim to these habits; that for a month or two before his death he had scarcely any of intellect left, and that in June 1830, it was at least questionable whether he had legal competency to make any contract, however simple, or however unimportant.

Iredell, for the plaintiff.

The defendants were not represented.

Gaston, Judge, after stating the pleadings and proofs as above

set forth, proceeded as follows: The plaintiff is not in
[29] this court an assignee. It is impossible for us to declare, upon these proofs, that the alleged assignment was for a fair and valuable consideration. The instrument of the 21st of August 1829, shows a contract founded in champerty, the most odious species of maintenance, prohibited by the common law, and denounced by statute, where he who maintains the suit of another is to have a share of the thing gained as a compensation. It was not therefore in the capacity of Taylor's agent, as the bill untruly alleges, but as a purchaser upon shares of Taylor's right to sue, that the plaintiff first interfered with this dormant claim, and got into possession a part of the negroes which gave rise to it. There should be clear evidence that this illegal contract was wholly abandoned, and one perfectly fair and unexceptionable substituted in its stead, before the character of the plaintiff's claim can recommend it to the aid of this court. Now instead of abandoning it, after the alleged new contract was formed, and at the very term where *that* is offered for probate and registration, the plaintiff presents in court, as valid and subsisting, and Taylor acknowledges as still binding upon him, the very instrument of August 1829. Must we not infer that the new contract, as it is termed, was new only in *form*, that it grew out of, and was subsidiary to, and *in execution* of the former? The note exhibited, if in truth it *ever* was in Taylor's hands, of which there is *no proof*, extrinsic or intrinsic, is of so *singular* a character as to yield no support to the plaintiff's side of the issue. It was drawn up by the plaintiff, and has *no date*. We have therefore no means of judging when nor for what it was executed. If given, as is pretended, in part consideration of an *absolute* purchase, what explanation is to be offered of the stipulation that Taylor should not negotiate it? Supposing that the true agreement between the parties was for a division of the property, confidently expected to be obtained, and that, to hold out the appearance of an absolute purchase, it was deemed expedient that a note should be made by Slade,—the stipulation was probably inserted to prevent Taylor from using it in violation of the *actual bargain*. The endorsement of a payment on it in July, has no sanction from Taylor. It is in the

plaintiff's handwriting, without signature or witness, and is dated when Taylor had nearly if not quite reached complete fatuity. [30] It is evidence at least that at that time the note was in the plaintiff's possession, when but a very trifling sum was alleged to be paid upon it; and it is not shown that it was found among Taylor's effects at his death, nor, otherwise than by the endorsement, that one cent was paid upon it. There is nothing then left for the plaintiff's allegation of a purchase for a valuable consideration to stand upon, except Taylor's acknowledgments; and if the proofs already considered lead to the result that the bargain was in truth for a division of the spoil, to which the parties were to give the semblance of a sale, it was to be expected of him not to hesitate in signing the instrument containing the formal acknowledgment of a consideration, and that in talking of the transaction afterwards, he should speak of it as a sale. Nay it is probable, as he said to some, that *some* money, a few dollars, might have been advanced to him to enable him to attend the cock-fight in Edgecombe, but it is not to be credited if so large a sum as $250 was then actually paid to this reckless and indigent man, and a note passed for securing the sum of $250 more, that no *show* of either should be made, and that he should continue in appearance ever afterwards, what at the time of the alleged purchase he in truth was, destitute of all means of subsistence but those furnished by his brother. When to these considerations we add Taylor's habitual drunkenness, mental imbecility, and blind confidence in those he supposed his friends—notice the close connection between him and the plaintiff, evinced by the contract of August 1829—and remember that the poor creature had been *till then* looking all around him in vain for some person who would accept, on any terms, a transfer of his right, to vex his wife, and interfere with the property saved for her out of the wreck of the portion which he got in marriage—we repose in these acknowledgments no confidence whatever.

The plaintiff does not claim as assignee of a legal interest. His assignment is confined to Taylor's interest, whatever it may be, in the property which was the subject of the division in 1824; and does not affect the property held under the division of 1819.

If it can have any operation, it is an assignment of his wife's entire distributive share in the negroes which her de-
[31] ceased brother, Joseph Monk, obtained in the division of 1819, of her share also of those parts of the negroes of which Thomas Monk died entitled in remainder, and which accrued to her deceased sister Martha, and to her deceased brother Joseph, and one-half of the share which was bequeathed to her directly in these last mentioned negroes by her father. When it was made, the subjects of the assignment were held in open hostility to his claim. The plaintiff comes here to have it enforced as an assignment in equity. It is not such, unless made fairly and for a valuable consideration. And we are all decidedly of the opinion that it was not so made.

Without therefore noticing the other grounds of defence, it is the opinion of this court that the plaintiff's bill be dismissed with costs.

PER CURIAM. Bill dismissed.

NOTE.—That a contract infected with maintenance or champerty cannot be sustained, see *Falls* v. *Carpenter*, 1 Dev. & Bat. Eq. Rep. 237; *Martin* v. *Amos*, 13 Ired. Rep. 201, and *Barnes* v. *Strong*, 1 Jones' Eq. Rep. 100. In the last mentioned case it was decided, that a contract between a father and son, made during the pendency of a suit against the father, whereby the son agreed to defend the suit for the father, in consideration of receiving a part of the property in controversy in case of success, was void, as coming within the prohibition of the common law against champerty.

JOHN VANN et Ux. and LEWIS GREGORY *v.* PETER HARGETT et al.

Where many persons are jointly entitled at law to a large number of slaves held by many different claimants, they may have relief in equity upon the bill of some in behalf of the rest, upon the principle of preventing a multiplicity of suits.

Where one general right is claimed in a bill filed against several defendants, a demurrer for multifariousness will not be available, although the defendants claim under several distinct titles.

Although a plaintiff, before he can come into equity to prevent a multiplicity of suits, ordinarily must establish his title at law, yet this rule will be dispensed with where he cannot recover at law by reason of a technical objection—as the number of parties, his ignorance of their names, and the like.

Notwithstanding it is a rule in equity, that all persons having an interest in the subject-matter of a suit must be parties to it, yet this rule is of necessity dispensed with, if they are unknown.

In the year 1783 Joseph Gilbert made his will, and thereby bequeathed to his daughter Mary A. Gregory, the wife of John Gregory, two female slaves for life, with a remainder to all her children which she then had, or thereafter might have, (excepting her son John,) equally to be divided between them. Of this will the testator appointed the County Court of Jones the executor.

The bill, which was filed in the year 1824, alleged that the testator at his death owed no debts, and that the County Court of Jones assented to the legacy to Mary A. Gregory: that she died in 1826, having survived her husband John Gregory more than twenty years, leaving eleven children, the issue of her marriage, of whom the feme plaintiff and Lewis Gregory were two: that three of her children, viz: Celia, Willis [32] and Ashton, resided in South Carolina: that the rest of them, whose names were set forth, had removed to other States unknown to the plaintiff, and were dead without representation in this State: that they all, except one, Allen, survived their father, but died before their mother: that John Gregory many years ago sold to Peter Hargett the elder, the two slaves above mentioned: that the sale was of the life interest of his wife: that twelve of the defendants, who were named, had possession of some of the issue of the two slaves, claiming them under Peter Hargett the elder, "well knowing the premises, and the just rights of your orators in behalf of themselves and others, the children of the said Mary Ann Gregory, and combining how to injure your orators and others their associates, have set up an absolute title to the slaves." The bill then proceeded, "that because of the absence and death of many persons, as herein before stated, entitled to claim with your orators, and the want of representation on the estates of many dead as aforesaid, it is wholly impossible for your orators to assert their rights in the ordinary form of law." No persons were made parties as the personal representatives either of Peter Hargett the elder, or of John or Mary Gregory, there being none in existence. The prayer was that the persons unknown, claiming an interest similar to the plaintiffs', might be made parties in such way as the court might direct, and also that they might answer and become parties defendant, and submit to such de-

cree as might be pronounced; and further that the other defendants claiming under Peter Hargett the elder, might discover the names of the slaves in their possession, and be decreed either to surrender them to the plaintiffs, or account for their value, if they had sold them, and for their hire since the death of Mary A. Gregory.

The defendants claiming under Hargett demurred to this bill, and assigned for cause of demurrer, first that the plaintiff had a remedy at law, by action of *trover* or *detinue*—secondly, for multifariousness.

His Honor Judge MARTIN, at Jones on the Spring circuit of 1832, overruled the demurrer, and the defendants appealed.

[33] The cause was argued in this court by *W. C. Stanly* and *Badger*, for the defendants, and by *J. H. Bryan*, *Haywood* and *Winston*, for the plaintiffs.

DANIEL, Judge, after stating the substance of the bill as above, proceeded as follows: The first cause assigned for demurrer, is because the plaintiffs have a remedy at law by action of trover or detinue.

After what was done by the County Court, and the long possession of the slaves by and under the mother, (tenant for life of the legacy,) the title of the plaintiffs seems to be admitted on both sides to be a legal title; we also think it is a legal title. But if the plaintiffs could by any possibility recover at law, that is not a reason sufficient, in a case like the one disclosed by this bill, why they may not also proceed in equity. The plaintiffs claim by, and seek to establish in themselves, one legal title to the slaves, as against each and all the numerous defendants now holding the same. The plaintiffs claim as executory devisees after the death of their mother, by force of the bequest in Joseph Gilbert's will. Lord REDESDALE says, courts of equity will take jurisdiction and prevent multiplicity of suits at law. And the cases in which it is attempted, and the means used for that purpose, are various. With this view, where one general legal right is claimed against several distinct persons, a bill may be brought to establish the right. Mitford's Pleadings, 145. Thus, where a right of fishery was claimed by a

corporation throughout the course of a considerable river, and was opposed by the lords of manors and owners of land adjoining, a bill was entertained to establish the right against the several opponents, and a demurrer was overruled. *Mayor of York* v. *Pilkington*, 1 Atk. 282. But it is argued here by the defendants' counsel, that this right to come into equity by a plaintiff, who claims one general legal right against several distinct persons, is confined to those cases where a judgment at law against any one of the many adverse claimants would not quiet the plaintiff against future disturbances and trespasses, even by that very defendant himself; as in the case referred to in Atkins. If any of the defendants had been sued at law for fishing in the river under their claim of a several fishery, and the plaintiff's title to a sole and separate fishery [34] had been established, still the plaintiff could have recovered at law only for the injury which he had sustained before issuing his writ; and he would, on a second trespass even by the same defendant, be compelled to bring a new action. That when the plaintiff, having the legal title, is liable to be harassed by a number of persons claiming the same thing adversely to that title, the plaintiff at law having no other remedy but to sue *toties quoties* as each and every one of those adverse claimants may make trespass, then and then only, as law cannot give complete relief, will the Court of Equity step in and give its aid, by ordering all the adverse claimants to submit their rights to one trial at law, or an action to be brought by or against one, or a few of the many claimants as may be directed. And, if the plaintiff's legal right be established on that trial, then all the adverse claimants, however numerous, shall and will, in equity, be forever enjoined, and the plaintiff forever quieted in his title and rights. And it is denied that except in cases of this kind only, will a court of equity entertain jurisdiction, to prevent a multiplicity of suits at law. The answer which we give to this argument is, that the case put by the counsel is but one among many where equity will interfere to prevent a multiplicity of suits at law. The cases in which it is attempted, and the means for that purpose, "are various," says Lord Redesdale. The case in Atkins is put as one among many in illustration of this rule. The object of a court of equity

in entertaining such a bill, is to prevent multiplicity of suits at law by determining the rights of parties upon issues directed by the court, if necessary, for its information, instead of suffering the parties to be harassed by a number of separate suits, in which each suit would only determine the particular right in question between the plaintiff and defendant in it. The notion, that equity interposes only to prevent a multiplicity of actions *toties quoties* as the trespasses are committed, is answered again by stating, that such a bill can scarcely be sustained, where a right is disputed between two persons only, until the right has been tried and decided at law. Mitford, 146. We think the first cause of demurrer must be overruled.

[35] The second cause assigned for demurrer, is for multifariousness. It is said, that the interest of each of the defendants is separate, and that neither one has any concern in the defence of their co-defendants. The court will not permit a plaintiff to demand by one bill several matters of different natures against several defendants; for this would tend to load each defendant with an unnecessary burthen of cost, by swelling the pleadings with the state of the several claims of the other defendants, with which he has no connexion. But a demurrer of this kind would hold only when the plaintiffs claim several matters of different natures. But when one general right is claimed by the bill, though the defendants have separate and distinct rights, a demurrer will not hold. Mitford, 182; *Dunn* v. *Dunn*, 2 Sim. 329; *Maud* v. *Acklon*, Ibid. 331. The plaintiffs do not claim several separate and distinct rights, in opposition to the several separate and distinct rights claimed by the defendants. But they claim one general and entire right, though it may be opposed by distinct rights claimed by the several defendants. Mitford, 182; *Burke* v. *Harris*, Hardress, 337. This ground of demurrer is therefore overruled.

The third cause of demurrer assigned *ore tenus* is, that the plaintiffs should have established their titles at law, at least in one action, before they filed their bill. The answer is, that indeed in most cases it is held, that the plaintiff ought to establish his right by a determination of a court of law in his favor, before he files his bill in equity. Mitford 146, (3 American Edit.) But it is not always necessary to establish a right at

law before filing a bill, as in cases of owners of patents, copyrights, &c., where the right appears of record. Ibid. 147. Nor will it be required where there are not the ordinary means of trying it at law. Ibid. 147. In this case, from the vast number of the parties interested, and the difficulty of ascertaining them without the aid of this court, it is not practicable to bring a suit at law in which the plaintiffs will not be exposed to defeat upon technical objections. And if a suit at law should be deemed necessary to establish the title, that suit can be brought under the direction of a court of equity with all the requisite facilities for a trial upon its merits. This cause of demurrer we think is not sufficient.

The *fourth* cause of demurrer, assigned also *ore tenus*, is that the plaintiffs, by their own shewing on the face [36] of the bill, have not made all the proper and necessary parties, there being other persons who are interested in the executory devise.

The old rule, that all persons having any charge upon, or interest in the estate, however numerous, must be made parties, has been dispensed with for purposes of convenience, when it is impracticable, or extremely difficult, to make them parties. 11 Ves. 429; 2 Mad. Ch. P. 182; 1 John. Ch. Rep. 349, 437. When a sufficient reason to excuse the defect of parties is suggested by the bill—as when a personal representative (as here) is a necessary party—and the bill states that the representation is in contest in the ecclesiastical court, an objection for want of parties will not hold. 2 Atk. 51; 2 Mad. C. P. 178. The plaintiffs have stated in their bill, that several of the children of Mary Ann Gregory removed out of the State and have died abroad, and that there are no representatives on their estates in this State. Neither are there any administrators on the estates of John and Mary A. Gregory, and therefore it is impracticable to make them parties. If the persons interested are out of the jurisdiction of the court, and it is stated so in the bill and proved, it is not necessary to make them parties. And though in these cases the court cannot compel them to do any act, it can proceed against the other parties; and if the disposition of the property is in the power of such other parties, the court may act upon it. *Smith* v. *Hobernia*, w. 1 Sch. & Lef.

Rep. 240; *Williams* v. *Wingates*, 2 Bro. C. C. 399; 1 Jac. & Walk. 369. The plaintiffs in this bill admit the rights of their deceased father, mother, brothers and sisters; and also the rights of those alive who reside out of the State. They allege the want of administration on the estates of the deceased persons, and the absence of others, as one reason why they did not proceed at law. The rights of the plaintiffs, which may be ascertained under a decree in this case as just demands, will hereafter be binding on those interested, who are not now parties to this bill. But those not parties will not be bound by any account taken in this cause, until they have the means to contest the facts. 1 Mad. Rep. 529; Mitford, 171; *Good* v. *Blewitt*, 19 Ves. 336. This may be an inconvenience to the
[37] defendants; but a greater inconvenience would exist on the other side, if the plaintiffs should be entirely deprived of their rights, because, according to the old rule, all interested were not parties, when the plaintiffs show that it is impracticable to make them parties. The law will not force the plaintiffs to be at the responsibility of administering on the estates of all the deceased relations.

We are of the opinion that the demurrer must be overruled, and the decree below affirmed with costs.

PER CURIAM. Order affirmed.

NOTE.—See, in support of the principles laid down in this case, *Robertson* v. *Stephens*, 1 Ired. Eq. Rep. 247; *Watson* v. *Cox*, Ibid. 389; *Parish* v. *Sloan*, 3 Ired. Eq. Rep. 177; *Ayer* v. *Wright*, 8 Ired. Eq. Rep. 229. See also Adams's Eq. 319–320.

ALLEN I. LAMB et al. *v.* ALFRED GATLIN, Ex'r.

A decree which passes against an executor *in invitum* is, unless impeached for fraud, conclusive upon the residuary legatees; but where it is by consent, it is subject to re-examination, and has no obligation unless proved to be just.

Although the debt of the wife does not survive against the husband, unless reduced to a judgment during their joint lives, yet if the husband be the administrator of, or guardian to the creditor, the debt is to be taken as having been received by him.

This was a bill by the residuary legatees of Isaac Lamb

against the defendant, his executor, for an account of the estate of the testator, and payment of the balance.

The usual order for an account was taken in the court below, and a report returned there to which sundry exceptions were filed. The only one necessary to state was, for that the master hath therein credited the defendant with the sum of $4000, because of a decree rendered against him in the court of equity for the county of Currituck, in a suit wherein Spence Hall and others were plaintiffs, and the said Gatlin was defendant. The item of credit thus excepted to was allowed solely upon evidence of the proceedings in the suit referred to, and of the decree therein made. From this it appeared that Spence Hall, James G. Hall, and Isaac N. Lamb and his wife Sidney, filed their bill against the said Gatlin as executor of Isaac Lamb, deceased, and therein charged that Spence Hall, the father of the plaintiffs, Spence, James and Sidney, died in the year 1807, and before his death duly made a last will and testament, whereof he constituted his wife Polly sole executrix during her widowhood and no longer, and after her widow- [38] hood, should she marry again, constituted Thomas R. Raynor sole executor: that the said Polly proved the will, and took upon herself the office of executing it. The bill charged, that by the will the testator directed that his schooner Sidney should be kept running as long as his executrix should think proper, or so long as she remained a widow, and that his wife should have the privilege of sending by said schooner for such necessaries as her family might want, and that the remainder of the earnings of the schooner should form a part of his estate. It was charged also that the testator directed, that his negroes Big George and Little George should be set at liberty on the 1st January 1820, and that at the death or marriage of his wife, all his property should be divided among the testator's children then living. The bill charged that the testator's widow kept the schooner Sidney running from the death of the testator until her intermarriage, in 1814, with Isaac Lamb, the testator of the defendant Gatlin, and received of the earnings of the schooner, exclusive of what she was entitled to receive for the family use, the sum of $3000 and upwards—and that she sold the negro, Big George, for the sum of $300,—and that these

sums, upon her intermarriage as aforesaid, came into the hands of her second husband, Isaac Lamb: that upon such intermarriage, Raynor, the other executor of Hall, qualified, and took into his possession the unadministered assets of his testator: that the plaintiffs in that bill, Spence, James and Sidney, together with Jordan Hall since deceased, were the persons entitled, upon the intermarriage of Polly Hall with Isaac Lamb, to the property of the testator: that Jordan Hall had died intestate, and the said Isaac Lamb had administered upon his estate, and the plaintiffs Spence, James and Sidney were his sole next of kin: that the said Isaac Lamb had died, having left a very large personal estate which came to the hands of the defendant Gatlin his executor. The said bill prayed process against the said Gatlin and Raynor, that Gatlin might be compelled to account for the sums so improperly retained by the wife of Hall, and on her intermarriage passed over to her second husband, and Raynor to account for the rest of the estate to which the plaintiffs were entitled. To this bill
[39] answers were put in. That of the defendant Gatlin admitted all the facts set forth in the bill, except that he declared his ignorance as to the amount of earnings of the schooner that came to the hands of the widow of Hall, and prayed that the plaintiffs might be put to the proof thereof; and the answer of Raynor also admitted the facts charged, but alleged that he had fully accounted for all the estate which had come to his hands. It did not appear what order was taken in the suit upon the coming in of these answers; but a document was afterwards filed purporting to be a report under a rule of reference, and to be made by S. Ferebee, in which, upon an examination of the depositions in the case, a statement was submitted of the matters in account. This statement, as to the freights and profits of the schooner, purported to conform to a deposition of Jeremiah Eldridge, the commander thereof (but no deposition was exhibited.) It makes the total amount of profits on the schooner, with interest until 1832, $5090 30; added thereto as debits the price of negro George $350, and interest thereon from 1809 to 1832, $462, making a total of debits $5902 30; then followed a lumping deduction of "sundry errors," by this sum of overcharge on items and interest, and

commissions on the earnings of the vessel, and for one fourth part of the earnings due Jordan Hall's estate, $1902 30, leaving the exact balance of $4000, which the referee reported as the sum due the plaintiffs, as by the above statement. This report was thus subscribed: "I sign this report at the request of the plaintiff I. G. Hall, as being made by the parties: S. Ferebee." And then followed the decree, "that this cause coming on to be heard on the bill, answers and report of the referee, it is ordered, adjudged and decreed, that the plaintiffs recover out of the assets in the hands of the defendant the sum of $4000, in full satisfaction of their claims. It is further ordered, adjudged and decreed, that the costs be paid out of the assets in the hands of the defendant."

Kinney, for the plaintiff.

A. Moore, for the defendant.

GASTON, Judge.—We are of opinion that the plaintiffs in this case, calling upon their trustee to account with them for their share of Isaac Lamb's estate, are at liberty to question the correctness of this decree which the defendant sets up as a charge, for its full amount, upon that estate. It is not *in truth* a decree rendered *in invitum*, and by a judgment of the court to which the defendant was compelled to submit, and which therefore not only binds *him*, but those also for whose benefit he held the estate, unless it can be impeached for fraud, but it is a voluntary settlement between the defendant and the persons then claiming, which the parties to that settlement have chosen to invest with the forms of a judicial determination. The decree is founded upon the report: *that* is without authority, and is avowedly adopted because it was made by the parties. A decree thus rendered as against the present plaintiffs has no force except so far as it is seen to be just. [40]

The plaintiffs insist that, upon the face of the bill filed in that suit, it appears that the claimants had no demand against the executors of Isaac Lamb. That bill is evidently based upon the assumption that Lamb was answerable out of his own estate for any sums of money due from his wife, at the time of her marriage, to the legatees of her first husband. This assump-

tion was unfounded, and until there be some explanation given why a claim thus unfounded was admitted by the executor, he cannot be permitted to set it up as a debt against the estate which he ought to pay, and his *cestui que trusts* to allow. The principle of Law and Equity is undoubted, that a husband, as such, is not chargeable with the antecedent debts of his wife, unless they be reduced to judgment during the coverture. The allegations in the bill, that the earnings of the schooner, and the price of the negro George, passed from the widow unto her second husband upon the intermarriage, cannot be understood as meaning more than that the property which came to his hands by the marriage was increased by the amount of what had thus been received by her and not accounted for. Money has no ear-marks, and without a *specific* averment to that effect it cannot be intended that the *identical* money arising from these earnings and the price of the negro was delivered over to the second husband. Besides, it is insisted that the account so settled, whether fraudulently or negligently, has been made up most inaccurately. The bill charged the widow with [41] having sold George for $300, and the answer admitted it; yet in the account, the price, without evidence, is set down at $350, and the interest is calculated upon that sum. It is moreover objected, that the account made out between the parties in the former suit is so stated as not to present an opportunity of examining its correctness. All the credits are grouped together into one item—of errors in overcharges and interest, of commissions and of the testator's fourth of Jordan Hall's share of the earnings of the vessel, amounting to $1902 30, so as to leave a round sum of $4000. It is further objected, that the testator, in right of his wife, was equally well entitled to a fourth part of Jordan Hall's share of the sum charged for the price of George, and *this* is not deducted. To these objections no satisfactory answers have been made, and we therefore feel it our duty to allow the exception. The decree is not evidence to support the master's finding.

But while we do this, we think it right to re-commit the report for the purpose of making an examination into the justice of the claim of Spence Hall and others, which was not open while the decree was regarded as conclusive. It appears from

the pleadings in this cause, that after the intermarriage of Isaac Lamb with the widow of Spence Hall, he became guardian of two of said Hall's children, and also administered upon the estate of the one that died. In his capacity of guardian, as well as that of administrator, it was his duty to secure what was due to his wards, and to his intestate, and whatever was then due from himself *and wife* ought to be regarded as so much *in his hands* as guardian and administrator. The master, therefore, to whom the report is re-committed upon the allowance of this exception, is directed to inquire and report whether any thing, and if any thing, what amount was due from Isaac Lamb, deceased, to Spence Hall, James G. Hall and Isaac N. Lamb and Sidney his wife, because of the said Isaac's guardianship to any of these parties, or of their being the next of kin of Jordan Hall, the intestate of the said Isaac Lamb. The decree, we think, ought to be a protection to the defendant for such sums as may be ascertained to have been justly due to the claimants in that *suit*, although these sums did not become due in [42] the manner alleged in the pleadings therein.

PER CURIAM. Decree accordingly.

NOTE.—Analagous to the case where the husband, as the administrator of the creditor, is presumed to have paid the debt of his wife by having received it in his capacity of administrator, is the case where he is presumed to have received the share of his wife as sole next of kin to an intestate of whom he is administrator. In such case, if the debts have been all paid, or assumed by him, and there are no reasons why he should hold any longer as administrator, the presumption will be very strong that he holds as husband, for himself. But where there are other next of kin besides the wife, the husband, in order to entitle himself to the property in his own right, must appear by some act to be exercising dominion over it, not according to his duty as administrator, or in the discharge of functions of a representative character, but for his own benefit, and as personally the owner. *Mardree* v. *Mardree*, 9 Ired. Rep. 295.

A. B. and H. D. SMITH *v.* RHODERICK B. GAREY.

Where the slaves of a feme sole were, upon her marriage, agreed to be settled upon the intended husband for life, and in default of issue subject to a power of appointment in the wife by writing in the nature of a will, and the wife died having made an appointment and an executor, and a creditor of hers obtained one judgment against the husband for her debt, and another judgment

for a different debt against her executor, and at the sheriff's sale first purchased the interest of the husband under the judgment against him, and then that of the wife under the judgment against her executor, he has, in equity, only an estate for the life of the husband, and as the amount which he bid for that, extinguishes *pro tanto* the first debt, he cannot hold the slaves against the voluntary appointee of the wife, until it is paid. But he has a right to hold the slaves as a security for the latter judgment, because under it he got nothing.

The act of 1785, (Rev. Stat., ch. 37, sec. 30,) directing, upon marriage settlements, that provisions shall be made for creditors, is confined to the estate and creditors of the husband.

The executor of a writing in the nature of a will, made by a feme covert under a power, takes no interest in the property subject to it: but it vests, without his assent, in the appointee.

The plaintiffs set forth in their bill, that in the year 1817, Sarah Smith, their mother, and then the widow of Etheldred Smith, being about to contract another marriage with Leonard Purdy, certain marriage articles were drawn up and executed between them, by which it was declared, that after the marriage the said Leonard should be entitled to the use and possession of the land and slaves of the said Sarah during his life, and that the said Sarah should have power, should she die without issue of that marriage, to give and bequeath the said slaves to whom she pleased: that the contemplated marriage, shortly after the execution of these articles, took effect, and the articles were duly proved and registered: that the said Sarah died in December 1819, without having had issue by the said Purdy, leaving the said Purdy her surviving, and having duly made and published a will, or writing in the nature of a will, whereby in execution of the power reserved by the said articles, she bequeathed certain of the said slaves to the plaintiffs in absolute property, share and share alike, and the residue thereof to Rebecca, the wife of the defendant Rhoderick B. Garey, for life, with the remainder to her children, and that at March Term 1820 of Northampton County Court, this will, or
[43] writing in the nature of a will, was duly proved as such, and William B. Lockhart, the executor therein named, qualified thereto, and took upon himself the execution thereof. The plaintiffs further set forth, that in October 1817 the defendant was duly appointed guardian of the plaintiffs, who were then infants; that the plaintiff Absalom came of age in 1822,

and the plaintiff Henry in 1824; that Leonard Purdy died in the year 1832, upon which event they became entitled to the enjoyment of the slaves bequeathed to them by the last will, or writing in the nature of a will, executed by their mother in pursuance of the power reserved in her marriage articles; that the said slaves, before the death of Purdy, came to the possession of the defendant, and were yet held by him, as having been purchased at an execution sale as the property of Purdy in the year 1821; that the plaintiffs had applied to the defendant and required of him the surrender of the said slaves to them, and to account for their hire and profits since the death of Purdy, which application had been rejected by the defendant, who set up an absolute title to the said slaves upon several grounds which the bill impeached as unfounded and pretended. The prayer was for a discovery of the names and ages of the negroes, a delivery of them and an account of hire and profits.

The answer of the defendant admitted all the charges in the bill above stated, and then set forth several distinct grounds of defence upon which he repelled the claim advanced against him. In the first place, the defendant alleged that before the marriage of the mother of the plaintiffs with Leonard Purdy, she had been administratrix of the estate of her late husband Etheldred Smith, and guardian of the plaintiffs: that she was largely indebted to the estate of Etheldred Smith, and to other persons, as administratrix of the said Etheldred, and also on her own personal account; particularly, that she was indebted as administratrix to the defendant and his wife, of whom the said Etheldred had been guardian, in the sum of $1800, and was personally indebted to the defendant in the sum of $600; that the debts of the said Sarah at the time of executing the said articles and of her marriage with the said Purdy, exceeded the amount of her whole estate and that of the [44] said Purdy; and therefore the defendant insisted, that the said marriage articles as a settlement were within the Equity of the act of 1785 entitled "an act directing that marriage settlements, and other marriage contracts, shall be registered, and for preventing injuries to creditors," and were void as against creditors, and should be so declared against the defendant; and the defendant averred, that the fact of the debts

of the said Purdy and the said Sarah at the time of their marriage exceeding their entire ability, has been manifested by the subsequent insolvency of the said Purdy. The defendant further sets forth in his answer, that the said Sarah being indebted as administratrix of Etheldred Smith unto the defendant and his wife in a large amount, because of the mismanagement of the said Etheldred, who had been guardian to the defendant's wife, the defendant and his wife, after the marriage of the said Sarah with the said Purdy, filed a bill against them to recover what was due, and thereupon the said Purdy and the defendant referred the matter in dispute to arbitration, and mutually executed bonds for the performance of the award: that an award was made in favor of the defendant and his wife, against the said Purdy and wife, for the sum of $1812 21: that for the non-payment of the sum awarded, the defendant brought suit upon the bond of the said Purdy, and obtained a judgment thereon for the sum of $1868 07; and the defendant insisted that said judgment, notwithstanding the form thereof, having been rendered for the debt of the said Sarah, the property of the said Sarah was in equity liable for the satisfaction thereof. The defendant also set forth, that after the death of the said Sarah, he instituted an action against William B. Lockhart her executor, and in September 1820, recovered a judgment for the sum of $609 49, because of moneys due to him personally from the said Sarah, in her life-time. The defendant then shewed, that having obtained these judgments, the one against Purdy, and the other against the executor of Mrs. Purdy, he so arranged that executions upon both should come to the hands of the sheriff, and a sale of the interests respectively of the said Purdy and the said Sarah in the slaves should be made at the same time, and that his object in doing so [45] was to advance the interest of the plaintiffs, his wards, by making the property bring its full price, as he had heard doubts expressed as to the legal efficacy of the *marriage* articles: that in pursuance of this arrangement, the slaves demanded in the bill of the plaintiffs were sold, first under the execution against Purdy, and then under that against Lockhart, the sheriff declaring publicly, before any sale was opened, that both titles were to be thus disposed of, and that

therefore the defendant bought all the said negroes; and the defendant referred to the said executions and the returns of the sheriff thereon. The defendant then set forth, that in pursuance of his purchase under the executions aforesaid, which happened on the 22d February 1821, he took immediate possession of the slaves so bought, and from that time had continually kept possession thereof as his own absolute property, and the defendant insisted that the claim of the plaintiffs to the said slaves, if they ever had such claim, was barred by the statutes of 1715 and 1820, to which he specially referred, and of which he claimed the benefit. The defendant further set forth, that an action was instituted, for the benefit of the plaintiffs, upon the administration bond given when the said Sarah was appointed administratrix of Etheldred Smith, against Purdy and his said wife and the sureties on the said bond, and a judgment recovered thereon for the sum of $5,500, which judgment was paid by the said sureties; that thereafter the said sureties, three in number, commenced actions respectively against the defendant, alleging that they had become sureties for the said Sarah upon the defendant's promise to indemnify them; that in truth the defendant had merely informed them that he was to act as the agent of the said Sarah in the administration, and would in all things which came under his management faithfully conduct the administration, and had not by any means rendered himself responsible for the mismanagement or defaults of the said Sarah, or any husband she might marry; that nevertheless upon some attempts to try the causes, it having become apparent that the extent of the defendant's engagement was misconceived or misrepresented by the witnesses brought on to testify in relation to it, the defendant by advice of counsel, and of his friends, submitted to a verdict and judgment in each case of $500 and paid the same, [46] whereby he had in truth paid off $1500 of debt due by the mother of the plaintiffs, under whom they claim the said negroes, and he was remitted in respect thereof to the claim which the said sureties had, or might have, against the said Sarah and the said negroes. The defendant therefore insisted, that if he was bound at all to surrender the slaves demanded in the bill, he was entitled in equity to retain that possession until full satis-

faction should be made to him of his two judgments aforesaid, and also of the $1500 so paid off by him in discharge of the claim of the said Sarah's sureties.

There were other allegations in the bill and defences in the answer thereto, but as the judgment of the court was not founded upon them, it is not deemed material to state them. The plaintiffs replied to the answer, and the cause was heard on the proofs.

Badger, for the plaintiff.

Iredell and *Devereux*, for the defendant.

Gaston, Judge, after stating the case as above set forth, proceeded as follows: It is manifest, we think, from an examination of the act of 1785, referred to in the answer, that the creditors thereby intended to be protected are the creditors of the husband. The evil recited in the preamble is, that marriage settlements and other contracts constituting charges or incumbrances upon the estates of husbands—"binding the estates of husbands"—have been made and kept secret, and that the "possessors," upon the credit of the property not known to be encumbered, "upon the credit of their apparent property," have been enabled to contract debts to the deception and injury of their creditors. The creditors contemplated in the preamble are, exclusively and evidently, those of the husband. The enactment contained in the 1st section is not so explicit as, taken *per se*, to leave no room for dispute, whether the creditors therein mentioned be those of the husband, or of the wife, or both. It requires that all marriage settlements and contracts, whereby any money or other estate shall be secured to the wife or husband, shall be registered within a prescribed time, "or be void against creditors." But when the section is regarded in connection with the preamble, and the enactment in the se-
[47] cond section, there is little room to doubt whose creditors were here contemplated. The second section, which directly bears upon the question before us—for the registration of the articles within the time prescribed by the first section is not disputed, and if disputed is fully proved—points unequivocally at the creditors of the husband. "For preventing injury

to creditors," it forbids that a greater amount shall be secured to the wife and the children of the marriage, than the portion received with the wife in marriage, and the net amount of the husband's estate after deduction of *his* debts. The whole amount of *her* property—without any deduction for *her* debts—may be included in the settlement for her benefit, and that of the children; but only the balance of *his*, after a deduction of a sum sufficient to meet the demands against him. The injury guarded against is a subtraction of his property from his creditors, so as not to leave enough for the satisfaction of their demands. The marriage articles therefore are not affected by the act of 1785, and not being impeached on any other ground, they are valid against the defendant.

Upon the marriage, the legal estate in the slaves whereof Mary Smith was possessed, passed to her husband Purdy, subject to the trusts thereby declared, one of which trusts was for the appointees of his wife, if she should leave no issue of that marriage. The legal estate of Purdy having been transferred to the defendant, as a purchaser thereof at execution sale, it passed charged with that trust independently of the notice, which the defendant admits he had, thereof; and the plaintiffs, as appointees under the power reserved to Mrs. Purdy, have a right to demand the execution of that trust against the defendant, unless the estate in his hands has been discharged therefrom, or he be protected against its assertion in whole or in part by the means alleged in his answer. It is contended in his behalf, that although the judgment and execution under which he first purchased were against Purdy only, yet as the judgment was because of a claim which the defendant had in right of his wife, against the wife of Purdy before their intermarriage, the defendant has a right, in equity, to be satisfied in respect thereof by the property secured to her, or over which she exercised her power of appointment. It is [48] unnecessary to examine this alleged equity very particularly, because, if it could be established, (of which we say nothing,) there is no room for its application here. The defendant purchased, under the execution against Purdy, *his interest* in the slaves at prices which, with a small sum in money paid by Purdy himself, paid off this judgment, and left no part

thereof unsatisfied. This appears distinctly from the return made upon the execution, which is referred to as a part of the defendant's answer. Assuredly under *that purchase* he acquired no further or other rights than would have been acquired by a stranger to the execution, and a stranger by such a purchase would have acquired all Purdy's interest—that is to say, the *entire* legal estate, but a beneficial interest only during his life. In this court the price would be regarded as paid for this beneficial interest—and in this court no further interest passed by the sale. The defendant claims to have been both purchaser and creditor upon this execution. As purchaser, under it he bought but Purdy's life estate—as creditor, his demand has been satisfied by the sale of that estate. He has enjoyed what he bought, and whether it has turned out more or less profitable than he anticipated—whether it was an advantageous or a losing bargain—it has been his profit or his loss, with which neither the plaintiffs nor any other persons but himself have any concern. The court sees nothing in the claim set up by the defendant as a creditor or purchaser, in relation to the judgment against Purdy, which in any way affects the right asserted by the plaintiffs.

The court is of opinion, that the defendant acquired nothing by his alleged purchase under the execution against Lockhart as executor of Mrs. Purdy. One reason alone—although others are not wanting—will be given for this opinion. The negroes in question were not the property of Mrs. Purdy, which upon her death came to the hands of her executor, for which *he* was liable to be charged as assets, and which might be seized and sold on an execution as the goods of the testatrix in his hands; but they were property in the hands of her husband, over which she had a contingent naked power of appointment. Had the power been exercised, there would have been no
[49] pretext for holding them to be assets at all—and the exercise of the power did not pass them as assets, *into the hands of the executor*. *He* could not claim against the will under which he set up all his authority. Upon the probate of the instrument called the will, the estate thereby appointed passed directly to the plaintiffs—not through the executor, or by virtue of *his* assent—but as though they had been named as

appointees in the instrument creating the power of appointment. But it is a well established principle of equity, that where there is a general power of appointment, which it is absolutely at the pleasure of the donee of the power to execute or not, he may appoint in favor of himself, or his executors if he pleases. If therefore he executes it gratuitously, to the neglect of the just demands of creditors, the thing so appointed shall be considered, as to them, as a part of the estate, as assets for the satisfaction of their demands. But how is this doctrine of equity carried into execution? not by annulling the appointment, or altering the disposition, but by holding the appointee a trustee for the creditors. *Townsend* v. *Windham*, 2 Ves. 1; *Lafeelles* v. *Cornwallis*, 2 Ves. 465; *Jenny* v. *Andrews*, 6 Mad. 264. The defendant in this case has established his claim as a creditor by reducing it to judgment. The plaintiffs have in no way attempted to impeach it. There has been no satisfaction of it, in whole or in part, except by the purchase made by the defendant at the execution sale against Lockhart. The plaintiffs claim, and in the judgment of the court are entitled to, the whole interest which was sold, or attempted to be sold, under that execution, but that interest is in their hands chargeable with the debts of their mother. Claiming equity they ought to do equity. Our law recognizes as a legal obligation the liability of the defendant in execution to refund to the purchaser at sheriff's sale the price applied towards the satisfaction of the judgment, if the purchaser be deprived of the property so bought—see Act 1807, ch. 723, Rev. Stat. ch. 45 sec. 22. We think therefore that it is right to require in this case that the plaintiffs shall not compel the surrender from the defendant, of the slaves in question, without satisfying the *rateable part* of the debt of their mother for which he obtained [50] judgment against her executor.

With respect to the claim which the defendant prefers, as constituting another charge upon the property, for the $1500 paid, under the circumstances stated in his answer, to the sureties of Mrs. Purdy, there is more difficulty. But whether it can or cannot be established, it seems to us that upon the present pleadings, and as between the present parties, the court has not a right to decide. If the claim be well founded, it is

because the defendant is *pro tanto* subrogated to the sureties, whose losses he has in part discharged. As a *partial assignee* he cannot proceed to subject this interest, without making his assignors parties. When made parties, they will be equally entitled with him to satisfaction out of this interest for that part of their loss which has not been remunerated. Until there has been some judgment or decree by which a priority is established, the plaintiffs are at liberty to pay any debts for which the estate is charged, and after paying the value of it they can be subjected no further. Under these circumstances the court deems it prudent to decline passing upon this claim, and leave it open to the defendant to assert it in any other mode of proceeding if he thinks proper, and be so advised.

The defence set up under the acts of 1715 and 1820 is altogether untenable. The right of the plaintiffs to the enjoyment of the property for which they have filed this bill, did not accrue until the death of Purdy in 1832, and the bill was filed in 1833.

There must be an account taken of the hire and profits of the negroes since the death of Purdy, allowing to the defendant the reasonable expenses and charges of maintaining them; and also an account of the debt due from the late Mrs. Purdy to the defendant; and an inquiry what is the part thereof which the negroes of the plaintiffs should bear in proportion to the whole value of the slaves appointed; and the plaintiffs are to be declared entitled to the possession of the negroes, and the balance that may be found due to them on taking these accounts, if the balance be in their favor; or entitled to the possession of the negroes, on paying the balance that may be found
[51] due against them, if on taking the accounts the balance be in favor of the defendant. Care will be taken in the decree to reserve to the defendant the right of urging hereafter the claim on which the court has forborne to pass.

Per Curiam. Decree accordingly.

NOTE.—The act of 1785 is contained in the Revised Code, ch. 37, sec. 24 and 25. The act of 1807, referred to in the opinion of the court, is to be found in the Revised Code, ch. 45, sec. 27; and the acts of 1715 and 1820 form the 3d and 20th sections of the 65th chapter of the Revised Code. As to the further construction of the act of 1785, see *Saunders* v. *Ferrill*, 1 Ired. Rep. 97. In the

case of *Smith* v. *Castrix*, 5 Ired. Rep. 518, it was held, that marriage settlements could not be proved before the clerk of the county court, as had been provided for deeds of trust and mortgages by the act of 1829, (see 1 Rev. Stat., ch. 37, sec. 25,) but now the 2d section of the 37th chapter of the Revised Code enacts that "all deeds, bills of sale, powers of attorney, and other instruments of writing required or allowed to be registered, may be admitted to registration in the proper county, upon being acknowledged by the grantor, or proved on oath, before one of the judges of the Supreme or Superior Court, or in the county court of the county where the land or estate is situate unless otherwise directed, or before the clerk of such court or his deputy." Marriage contracts and settlements would, it is believed, be included under the terms "other instruments of writing required or allowed to be registered."

ANDERSON B. HOLDERBY *v.* JOHN C. BLUM.

The assignee of a bond without notice, who took it before it fell due, as a security for a pre-existing debt, without paying anything for it, or impairing his original debt, in consideration of the assignment, is not a purchaser so as to protect himself against an equity, subsisting in favor of the obligor, to have the bond cancelled.

The cases of *Donaldson* v. *Bank of Cape Fear* (1 Dev. Eq. Ca. 103, and *Harris* v. *Horner*, ante 1st vol. p. 455,) approved.

The case upon the pleadings was as follows: The plaintiff purchased of A. D. Murphy a tract of land, and executed four bonds, to secure the purchase-money, payable at different times. Subsequently the plaintiff became embarrassed, and Murphy agreed to receive a re-conveyance of the land, and to surrender the bonds. This agreement was executed by the plaintiff, but Murphy on several pretences evaded the execution of his part of it, assigned them before they became due to the defendant, the agent of the Bank of Cape Fear at Salem, as collateral security for a judgment obtained against him by the bank. Upon this assignment nothing was paid Murphy for the bonds, neither was the judgment of the bank in any way affected thereby.

The plaintiff prayed that the bonds might be surrendered to be cancelled, and for an injunction against a suit commenced on them by the defendant.

J. T. Morehead, and *Boyden*, for the plaintiff.

Mendenhall, for the defendant.

DANIEL, Judge, after stating the facts, proceeded as follows: The plaintiff, as to Murphy, had an undoubted equity to have the bonds surrendered and cancelled. What is there in the case that puts the defendant in a better situation than his assignor? The defendant says that he was only agent of the Bank in this transaction. But we think the facts admitted, in law make him also the agent of Murphy.

[52]

But let us put the case in the strongest light against the plaintiff. Suppose the assignment of the bonds had been to the bank directly; still, if the bank had given no new credit, money or other consideration for the assignment, it could not pretend to have an equity equal to that of the plaintiff, although it might have the legal title. Therefore the rule, where equity is equal the law shall prevail, could not have aided the bank. In the language of this court, in the case of *Donaldson* v. *Bank of Cape Fear*, 1 Dev. E. Rep. 103, we would ask, what value did the defendant or the bank pay for the assignment? Nothing: it was to secure a debt contracted before the assignment was contemplated. As regards expenditure, the bank stood after, as it did before the assignment. Had the bank purchased with an antecedent debt, the extinguishment of the debt would have been value sufficient. But the judgment against Murphy was not released or extinguished by the bank; it stands in full force now. The assignment is without foundation, and as to the plaintiff void. The law, as just stated, was by this court affirmed in the case of *Harris* v. *Horner*, ante 1st vol. 455. We think the case clear against the defendant, and the plaintiff must have the decree prayed for.

PER CURIAM. Decree accordingly.

NOTE.—See the note to the case of *Harris* v. *Horner*, in the 2d edition of 1 Dev. & Bat. Eq. Rep. 455. In *Potts* v. *Blackwell*, 3 Jones' Eq. Rep. 449, the court say, in reference to the question whether a deed of trust or a mortgage made to secure an existing debt is a conveyance for a valuable consideration, that "it is a settled principle, acted upon every day, that the trustee or mortgagee is a purchaser for a valuable consideration within the provisions of the 13th and 27th of Elizabeth; but it would seem that they take subject to any equity that attached to the property in the hands of the debtor, and cannot discharge themselves from it on the ground of being purchasers without notice; in like manner as a purchaser at execution sale takes subject to any equity against the debtor, without reference to the question of notice. This distinction is a plain one, and reconciles the cases, *Donaldson* v. *Bank of Cape Fear*, 1 Dev. Eq.

Rep. 103; *Harris* v. *Horner*, 1 Dev. & Bat. Eq. Rep. 455; *Holderby* v. *Blum*, 2 Dev. & Bat. Eq. Rep. 57, with the settled principle stated above." See, also, *Reddick* v. *Jones*, 6 Ired. Rep. 109; *Ingram* v. *Kirkpatrick*, 6 Ired. Eq. Rep. 463; *Baggarly* v. *Gaither*, 2 Jones' Eq. Rep. 80, and *Potts* v. *Blackwell*, upon a petition to rehear, 4 Jones' Eq. Rep. 58.

OSBORNE VAUGHAN et al. *v.* SAMUEL DICKENS et al.

A residuary bequest, "to my six brothers and sisters, and to their respective heirs of their bodies, but no further, and these must be living at the death of my wife," held to mean that the brothers and sisters were to take if they were then living; if not, then that their children were substituted legatees, excluding their grandchildren. And a direction to his executors to exclude from the division such as should not claim within five years after advertising the death of the widow, and to divide it equally between those applying, was held to make a joint tenancy so as to prevent a lapse by the death of any of the residuary legatees.

A legacy of a negro "to be delivered after the death of my wife," vests in interest at the death of the testator.

This was a bill for an account of the administration by the defendant Dickens, of the estate of James Vaughan his testator. The sole question was whether, under the will [53] and the after stated facts, the testator had died intestate as to any part of his estate. If so, then the plaintiffs were entitled to a share of it. The following are those parts of the will which were relied on by the parties for their respective construction of it.

"Imprimis.—I loan to my beloved wife Ann Vaughan, my whole estate real and personal, in manner and form as hereafter to be stated and described, with some exceptions hereafter to be named, during her widowhood.

"I give and bequeath to my beloved wife Ann Vaughan, one third of my estate real and personal, my carriage and two best horses, four beds and furniture, all the curtains and toilets of every description, to her and her heirs forever.

"I give and bequeath to my nephew Dr. William Vaughan, son of my brother William, who now resides, or did the last time I heard from him, in Woodville, State of Mississippi, my negro woman Patt, from whom I had her, together with her two children Maria and Moses, and all her future increase.

Also one negro fellow or woman, his choice belonging to my estate, to be delivered after the death of my beloved wife, to him and his heirs forever.

"I give and bequeath to my niece, Inne Dickens, to be delivered at the time aforesaid, the second choice of my negroes, to her and her heirs forever.

"I give and bequeath to my neice Martha or Patsey Walker, to be delivered as aforesaid, the third choice of my negroes, to her and her heirs forever.

"I give and bequeath to my nephew Henry Rose, £100 Virginia currency, to his sister Catharine, £50, to be paid as aforesaid if they are living, if not the gift revoked as to the dead.

"I give and bequeath in like manner £50 each to my three nieces, daughters of my sister Catharine Putney.

"The property therefore to be divided will be my negroes, my Nutbush land, and the manor house and lot on which I live, in case my estate should not draw the lot in which Patt and her children should fall; in that case I wish my executor to barter a negro or negroes for them; this failing, the
[54] value of them must be paid my nephew William, what they may be worth at the time he is to receive them.

"The net residue of my estate not already devised, I give and bequeath to six sisters and brothers, and to their respective heirs of their body, *but no further*, and these must be living at the date of the death of my beloved wife, when the devises are payable, to-wit: sisters, Mary Rawls, who afterwards intermarried with —— Christenberry, Elizabeth Rawls, Mildred Collier; brothers, Thomas Vaughan, William Vaughan, and sister Catharine Raney, who since intermarried with Benjamin Putney.

"6th. With respect to my sister Catharine's children, I except one, by name Thomas, who I have been told has been undutiful to his mother; he I am told is well off; out of her part he is to have one shilling Virginia currency only; *to each of those one sixth part of the net amount of estate not already devised.*

"7th. My executor will advertise the most responsible and the best calculated to entrust, to come forward with powers of attorney to receive each dividend, being themselves legatees, and one from each family, so soon as he is ready to pay them,

and in case they fail to come forward in *five years* from the date of advertising, *the part so given is to be equally divided amongst the others applying.*"

William Vaughan survived the testator, but died before his widow. Of the six residuary legatees four died before the testator; one survived him but died in the life-time of the widow; and one survived the widow; and two of those who died before the widow left children.

The *Attorney General*, for the plaintiffs.

Devereux, for the residuary legatees.

Wm. H. Haywood, for the executor of the widow.

RUFFIN, Chief Justice.—The legacies to the testator's nephew William are clearly vested, and did not lapse by his death in the life-time of Mrs. Vaughan, the tenant for life. The words of the bequeathing clause import a present gift of the specific slaves, to be delivered after the death of the testator's wife; that is, it is a limitation by way of a vested remainder or executory devise. There is nothing subsequent in the will to change this character. The counsel for the plaintiffs relied on [55] two of its provisions as having that effect. The one is the following clause: "I give to my nephew Henry Rose £100; to his sister Catharine £50, to be paid as aforesaid, (that is, at the death of his wife,) if they are living; if not, revoked as to the dead." But this is clearly confined to the two pecuniary legacies given in that clause, and to the legacies "given in like manner" in the clause immediately succeeding it. It is not a restriction upon the legacies to William, which are given in a previous independent clause, between which and that in favor of the Roses there are two other absolute dispositions of slaves to nieces of the testator. To neither of those three dispositions is any such restriction annexed; and the words in the subsequent clause cannot be connected with them, but are satisfied by applying them to the gifts to the Roses. The other provision relied on is this: "in case my estate should not draw the lot in which Patt and her children should fall, I wish my executor to barter a negro or negroes for them; this failing, the value of them must be paid my nephew William, what they

may be worth at the time he is to receive them." It is contended, that this changes the absolute character of the first gift. So it does; but not so as to annex the gift to the payment, and turn a vested into a contingent legacy. The testator seems to have supposed that the division of his negroes, so as to set apart his wife's third in severalty, must in law be made by lot, and that therefore possibly the slaves given to his nephew might be lost to him by falling to her. Under this impression he merely directs that, in that event, his nephew shall have the value of those slaves, instead of the slaves themselves, unless his executor could exchange with his wife. This provision was intended to secure his nephew in the substance, instead of cutting down his legacy. The legacy may be specific or pecuniary as things should turn out; but whether the one or the other, it was, at all events, to be vested.

The questions made on the residuary clause admitted of argument; for confident opinions cannot be formed as to the intentions of one who writes so inaccurately and confusedly, and with so little knowledge of the sense of his own words as this testator. But, upon the whole instrument, we believe [56] it will sufficiently appear, that the testator meant not to die intestate, as to any part of his estate, but by the clause in question to provide against that event, unless, and only in case, his six brothers and sisters named, and all the children of each of them, should die before his wife. If so, the plaintiffs as next of kin are not entitled to any part of the residue, as at the death of the widow there were living children of three of those persons. The gift is "to six brothers and sisters (named) and to their respective heirs of the body, but no further, and these must be living at the death of my wife—to each of these one sixth part" of the residue. If this stood alone, it would not be a joint legacy, but a gift to each of one undivided sixth, as a distinct share; and perhaps also, upon technical grounds, must be construed to be a gift to the brothers and sisters alone, and not one to their respective children, in case the parents died. In that case, as to the shares of the four who died before the testator, leaving no children, there would clearly be a lapse; and if the latter part of the proposition be likewise true, there would be a further lapse of the other shares,

because all but one of the brothers and sisters died before the widow. But we think this is not the proper construction upon either of those points. The terms "heirs of the body" are not used in a technical sense, as words of limitation; nor are they words of purchase, as giving immediate interest to the children of the brothers and sisters, with their parents. They mean "children," who are not to take in succession from their parents, notwithstanding the copulative conjunction, but are to take, in the alternative, the share of their respective parents if the latter be dead at the death of the testator, or be not alive to take at the death of the widow. This may be partly collected from the words "but no further," in this part of the clause, and immediately following "and to their respective heirs of the body." The testator cannot be supposed to mean that his brothers and sisters should not take an absolute property, but an estate tail; as that would be futile, since such an estate is the fee in our law. Still he meant to exclude their collateral relations from taking under the description, and confine the gift, at most, to their descendants. He meant further, we think, to exclude among them, grand-children, and to confine the gift to those who would take by representation their pa- [57] rents' share, under the statute of distribution, if he had died intestate, that is, brothers' and sisters' children. That such an idea was in the testator's mind, however imperfectly expressed, is detected by these words "but no further;" which, else, have no meaning. But the testator puts his own construction upon "heirs of the body but no further," in the next sentence of the same clause, in which he expresses himself thus: "with respect to my sister Catharine's children, (Catharine being one of the sisters just named,) I except one, by name Thomas, who, I have been told, has been undutiful to his mother—he is I am told well off: out of her part he is to receive one shilling only." This makes it plain in what sense "heirs of the body" are to be understood; namely, "children." The words "out of her part he is to receive" denote also that he was not to take with her, but that the whole share was *hers*, if she should be alive; and if she should be dead, the same share which he calls, and would have been "her part," is to go to her children, except Thomas. The children of a deceased bro-

ther or sister therefore take instead of their parents, by substitution.

Then as to the shares of those brothers and sisters who died before the widow and left no children. They would go to the next of kin of the testator, were it not for another provision in the next clause; which shows, that notwithstanding the division into shares in the residuary disposition, the testator meant a joint tenancy for some purpose, so as to avoid an intestacy as to any part. As only such persons were to take as might survive his wife, and she might not only outlive all the brothers and sisters, but might live for many years, so that in the mean while his own relations, who were the objects of his bounty, might be scattered abroad, and not be found by his executor, or not know of their rights, or neglect to apply for their legacy, the testator proposes to obviate all the difficulties that might arise at that late day, as to the mode of inquiring for and ascertaining the persons to take, and as to the shares of the whole residue, that such of his relations as might thus be found should have. He says, "my executors shall advertise for the most responsible and best calculated to entrust, to come forward with powers of attorney to receive each dividend, being themselves legatees, and *one from each family*, so soon as he is able to pay them; *and in case they fail to come forward in five years from the date of the advertising, the part so given is to be equally divided amongst the others applying.*" Those who take are to take in families; and those families, if any apply, are to have all, is the meaning of the will. There is no intestacy, therefore, since the children of some of the testator's brothers and sisters survived the widow, and did apply for and receive the estate.

[58]

The bill must be dismissed with costs.

Per Curiam. Bill dismissed.

JOHN S. WYNNS *v.* RANKIN ALEXANDER et al.

The acts of 1723 and 1794, (Rev. Stat., ch. 46, sec. 10 and 11,) directing the mode of selling the personal property of decedents, is merely directory, and does not affect the power of sale vested in the executor by the common law.

It should however always be followed, as, in the absence of fraud, it is a complete protection to the executor.

The case of *Cannon* v. *Jenkins*, 1 Dev. Eq. Ca. 427, approved.

The case made by the pleadings and proofs was, that Peter Wynns by his will gave to his wife Elizabeth Wynns a negro woman for life, with remainder to his children: that his executors exhausted all his assets in the payment of his debts, excepting that slave and a horse: that they then settled their accounts with the county court, when it appeared that the sum of £181 14s. 1d. was still due for outstanding debts of the testator: that the widow agreed with the executors for the purchase of the slave and horse, upon the terms of her paying those debts: that this agreement was perfectly fair, and the sum agreed to be paid was a full price for the slave and horse: that the widow continued in possession of the slave for many years, and gave, of her issue, several other slaves to the defendants, who were her children, or who had married her daughters. The plaintiff, a son of the testator, filed this bill claiming an interest in this slave and her issue, and [59] praying to have his share of them assigned to him.

W. J. Alexander, for the plaintiff.

Caldwell, for the defendants.

Daniel, Judge, after stating the facts as above set forth, proceeded as follows: It appears to us that the title to the slave, which at law was in the executors, was *bona fide*, and for a full consideration transferred by the executors to the widow. The act of Assembly (Rev. Stat. 275,) provides, when the estate of a person deceased shall be so far indebted that the debts cannot be discharged by the moneys on hand, or by the sale of the perishable commodities, then it is and shall be the duty of every executor or administrator to sell the goods and chattels at public sale for the most that can be got for them, after public advertisement, first obtaining an order of the court of the county for that purpose. The executor or administrator might, before the passage of the act, have sold *bona fide* the goods and chattels of the testator or intestate. The legal title was in him, and an honest purchaser from him would always have acquired

a good title. The common law on this subject is not repealed by this act. The statute is only directory, which however it would be well always to follow, for if the executor or administrator fails to obtain as much at private sale as would have been got at public vendue, he or they would be bound to make good the deficiency out of their own pockets. *Cannon* v. *Jenkins*, 1 Dev. Eq. Ca. 427. We are of opinion from a full examination of this case, that the plaintiff has no ground to entertain this bill, and that the same must be dismissed. Costs are not given to the defendants, because the purchase not having been made in the mode directed by the act of Assembly, the defendants ought to bear a share in the expense of investigating the good faith of the transaction.

PER CURIAM. Bill dismissed.

NOTE.—The acts of 1723 and 1794 are contained in the Revised Code, ch. 46, sec. 17 and 18. In the case of *Fanshaw* v. *Fanshaw*, Busb. Rep. 166, it is said of the power of an administrator to sell slaves without an order of the county court, that, "as administrator, he had no rightful authority to sell the slaves until he had obtained an order of the county court for that purpose." If by this expression the court meant that the sale by the administrator without an order of the county court would not convey any title to the purchaser, they were in error, as is shown by the present case. If it was only intended to assert that the administrator making a sale of a slave under such circumstances would be acting wrong, and as he had a power to sell, under an order of the court appointing him a commissioner to do so, that his sale must be referred to the latter power, then there is no inconsistency between that case and the present. The latter is manifestly the proper construction, though the language of the court is not so explicit as it should have been.

[60] SARAH SPACK et al. *v.* JOHN LONG et al.

Generally a legatee cannot sue the debtor of the testator, it being the right and duty of the executor to collect all the debts; but where the executor was insolvent and manifestly under the power of the debtor, and that power was collusively exercised to the injury of the legatees, they may, in equity, have an account against the debtor.

From the pleadings it appeared, that Frederick Long made his will in the year 1807, and therein bequeathed pecuniary legacies to some of the plaintiffs, and the residue of his estate to the plaintiffs and some of the defendants. After making the

will he became of nonsane mind, and after inquest found, his son John, one of the defendants, was appointed guardian in November 1811. For alleged misbehaviour, John was removed from the guardianship in November 1821, and his brother George, another of the defendants, appointed thereto. Each of the guardians had in his possession some estate, real and personal, of the lunatic, but never made proper and full returns to the county court. In 1826 the lunatic died, and his will was proved by his former guardian George Long, who was nominated therein the executor. The bill was filed in March 1833, and charged, besides the above facts, that the two defendants, John and George Long, respectively entered upon lands of which their father was seized, and received the profits, or ought to have received them, to the use of their ward, but in reality applied them to their own uses respectively, on pretence that the lands belonged to them; and that John never accounted with George either as subsequent guardian or as executor, but that the latter, soon after his appointment to the guardianship, became himself addicted to excessive intemperance, and was insolvent and wholly unfit to manage business, and under the control or influence of his brother John; by reason whereof, and by collusion between them, he never called him to account, and then refused so to do. The bill alleged a considerable balance to be in the hands of each of the defendants, and that what was in those of John could not with safety be intrusted to the management of George, on account both of his unfaithfulness and insolvency; and it prayed for an account, from each, of the estate in their respective hands, or that ought to have been received by them, and for payment thereout of the legacies to the plaintiffs. [61]

The answer of John Long denied the charge of collusion, and as evidence to repel it, stated that he resisted his own removal and the appointment of his brother, and appealed from the order, because the imputations against himself were unfounded, and George was not, in his opinion, a fit person to be the guardian of his father's person or estate. It stated that this defendant delivered over certain bonds belonging to the lunatic to George upon his appointment, and denied all intermeddling afterwards; but it did not set forth any account between those

parties, nor allege that any final one was ever made, but, on the contrary, admitted that this defendant had not accounted for the profits of certain parts of his ward's lands, and insisted that he ought not to account for them, because his father, before he became lunatic, gave him permission to take possession, and take the profits to his own use. By plain inference, if not explicit admission in this answer, it appeared that George Long was an illiterate, improvident, and insolvent sot, not trustworthy to transact affairs, and especially to receive money.

As an exhibit, a receipt from John to George Long was filed by the latter for the sum of $144 92, dated the 3d of February 1827, and expressed to be "for part of his trouble for being guardian to Frederick Long."

Boyden, for the plaintiffs.

J. T. Morehead, for the defendants.

Ruffin, Chief Justice, after stating the facts as above set forth, proceeded: Upon the answer of George Long there is no reason why the court should not proceed to an account of what is or ought to be in his hands, arising out of either of his offices of guardian or executor; and it must, of course, be ordered. It is equally clear that John Long ought to account in like manner to some person. The only question is, whether the plaintiffs as legatees have the power to call for it. Generally, the executor alone can sue a debtor to, or trustee for the testator, in respect of personalty. But we think the present is a case within the established exceptions. If the insolvency and
[62] incapacity of the executor would not, *per se*, suffice, yet those facts, with others, admitted or clearly proved, raise so high a presumption of collusion as to establish it for this purpose. Doubtless the denial of it in the answer may be true as to the period to which that positive denial particularly points, that, namely, of the contest for the guardianship. But their subsequent conduct is not susceptible of the same charitable interpretation. These persons are brothers, residing in the same neighborhood, and cognizant of each other's transactions and liabilities in their respective offices, and bound to account with each other, for the benefit of third persons. But

they do not account for a period of eleven years, and the executor is known by each to be irresponsible by reason of his insolvency; and each of them, upon a ground common to both, deny a liability for the profits of certain parts of the real estate, with which *prima facie* they are chargeable. Can one help entertaining a strong suspicion, under such circumstances, that the laches of the executor, otherwise so unaccountable, ought to be attributed either to positive collusion, or to that undue influence, exercised for gain by one brother, and yielded to by another, which amounts to the same thing in good sense, and in the view of a court of justice? If to those grounds of presumption be added the surprising fact, that six years after the former guardian had handed over to his successor what he thought proper as the effects of the ward, and a few months after the death of the ward, when the latter was acting as executor, the former so far prevailed over him as to induce him, contrary to law and common reason, to pay back to him a sum of money in part of some larger sum which he claimed for his trouble as guardian; and all this without, even then, coming to an account. The evidence cannot be resisted of a power and control so exerted, for unfair and unjust ends, by the one over the other, as to constitute collusion. George Long might, perhaps, from negligence have omitted to sue John. It is possible. But there is enough in the case to satisfy the mind that he was not singly negligent, but that he was also unwilling to sue, and was thus unwilling because it was against the interest and wishes of his brother. There is therefore a proper ground for this bill of the legatees against John Long; and there must be a similar reference to take his accounts. The other ques- [63] tions made in the pleadings will properly come up for decision upon the report of the master.

PER CURIAM. Direct an account.

NOTE.—See the case of *Fleming* v. *McKesson*, 3 Jones' Eq. Rep. 316, where the present case is referred to and the principle established by it approved. It was there decided that, though, generally, the next of kin cannot sue the debtor of the intestate, yet, where an administrator is manifestly under the influence of the debtor, and that influence has been collusively exercised to the injury of the next of kin, they may, in equity, have an account against such debtor.

IN THE MATTER OF HENRY SKINNER'S HEIRS.

Land situate in two counties may, under the act of 1812, Rev. Stat. ch. 85, sec. 7, be sold for partition by a decree of the court of equity for either county.

Where all the heirs of a decedent join in a petition to sell his land, the purchaser acquires all their estate; and if some of them are infants, no day is given them to show cause against the final decree.

Henry Skinner, a resident of Perquimons, died seized of a tract of land lying in that county and Chowan. All his heirs joined in a petition to the court of equity for Perquimons, for the sale of the land which descended to them, for partition, and a decree was pronounced directing the clerk and master to sell it before the door of the Court House in Perquimons: at that sale one Roberts purchased, and upon the coming in of the report of the sale, he objected to the confirmation of it, because he was advised that he could acquire no title under the sale to so much of the land as was situate in Chowan. His Honor Judge SETTLE, on the last circuit, overruled the exception of Roberts, but allowed him to appeal.

A. Moore, for the appellant.

No counsel appeared against the exception.

DANIEL, Judge, after stating the facts, proceeded as follows: The act of Assembly declares, "It shall and may be lawful for any court of equity, in cases of application for a division of real estate, when it shall be made to appear that an actual partition cannot be made without injury to some or all interested, to order a sale of the property on such terms as the court shall deem just and reasonable." (Rev. Stat. 452, sec. 7.) The court, at their discretion, may direct such sale to be made on the premises, or at any other place within the county where such estate is situated. *Provided always*, that when the order of sale shall contain no such direction, sales shall be made at
[64] the places prescribed by law for public sales. (Ibid. sec. 9.) In this case there can be no doubt but that the court of equity for Perquimons county had jurisdiction, as part of the lands lay in that county, and part in Chowan. The act

does not confine the jurisdiction to the particular court of equity of the county where each several tract of land may be situated. The terms or words of the act are, "It may be lawful for any court of equity, &c., to order a sale of the property." There was a direction in the order of sale, that the lands should be sold before the door of the court-house of Perquimons county. This is nothing more than what the law would have required of the master of that court, if nothing had been mentioned in the order as to the place of sale. The act prescribing where masters in equity shall sell lands, when there is no special direction in the order of sale, declares, that they shall make sale, under decrees, at the court-house of their respective counties. (Rev. Stat. 267.) As the court of Perquimons had jurisdiction to order the sale of all the lands, it seems to us, that the master of that court could, by force of the act just mentioned, sell all the lands before the door of his court-house, although some of the tracts lay in Chowan. But if this were not so, as all the heirs are plaintiffs, and the terms of sale were prescribed at their own instance, and they have moved for a confirmation of the report, they will be for ever bound by it. They, although some are infants suing by guardian, will not have a day given them in the final decree to show cause against it, when they come of age. It seems to us, that Roberts will have such title as the plaintiffs now have, by force of a conveyance to be made by the master of the court of equity making the order of sale.

The order of confirmation of the report, therefore, is here affirmed with costs.

PER CURIAM. Decree affirmed.

NOTE.—The act of 1812 (1 Rev. Stat. ch. 85, sec. 7,) is contained in the Revised Code, ch. 82, sec. 6 and 7. As to the place of sale, see Revised Code, ch. 82, sec. 8, and ch. 45, sec. 14 and 15. As to the binding effect of the decree confirming the sale, see *Stewart* v. *Mizell*, 8 Ired. Eq. Rep. 242.

ELIZABETH FOSCUE v. JOHN E. FOSCUE et al. [65]

A legatee may, after an assent by the executor, file a bill to obtain his legacy—especially where he has no testimony of the assent, and the executor refuses to deliver it, and account for its profits.

The bill charged that Simon Foscue the elder, the father of the plaintiff, by his will bequeathed a male slave to her, and appointed Simon Foscue the younger his executor, who sued out letters testamentary, and duly assented to the legacy, but died before he had delivered the negro to the plaintiff, and appointed the defendant, John, his executor—that the latter refused to deliver the slave, alleging that Simon Foscue the elder had, after the bequest to the plaintiff, made a deed of gift of the same slave to Dorcas Foscue, who was a defendant. That the plaintiff had brought an action of detinue for the slave against the defendant John, but had failed therein, because of the death of the only witness by whom she could prove the assent of Simon the younger. The prayer was for a delivery of the slave, and an account of the profits made by his labor.

The defendants demurred for want of equity, and at Jones, on the last circuit, NASH, Judge, *pro forma*, sustained the demurrer and dismissed the bill, and the plaintiff appealed.

No counsel appeared for the plaintiff.

J. H. Bryan, for the defendants.

DANIEL, Judge, after stating the substance of the bill, proceeded as follows: The legacy being specific, after an assent by the executor he was clearly liable at law to an action by the legatee. Because an interest in the specific legacy vests at law in the legatee upon the assent of the executor. 2 Williams on Executors, 1188. But, is the jurisdiction lost which this court certainly once had over the subject? We think not. Where the executor had assented to a specific legacy, and the legatee brought trover and had a verdict, the executor filed a bill to enjoin him. Lord HARDWICKE said, it would be very extraordinary if a legatee must in every instance bring a bill in this court. *Williams* v. *Lee*, 3 Atk. 223. Intimating clearly that he might do so. Where the executor assented to a devise for a term of years, the assignee of the legatee entertained
[66] a bill in equity to be put in possession. *Moon* v. *Blagrave*, 1 Ch. Cas. 277; Ward on Legacies, 371. The executor in equity is but a trustee; this court must necessarily have the power to coerce him to a complete execution of the

trust. The bare assent which will give a court of law jurisdiction will not at the same time deprive this court of its jurisdiction to see that the trust be completely executed. In *Jordan* v. *Jordan*, 2 Car. Law Rep. 409, the Supreme Court said, that the jurisdiction of equity over trusts, can be taken away only by showing a complete execution of the trust. Here there has not been a complete execution of the trust, because that required the executor not only to assent to the legacy, but to deliver the subject specifically; and also to account for the profits. As to the other defendant, she is a mere volunteer; at least not a purchaser from the executor; and therefore her right in this court must depend upon the inquiry, which is the better original title under the testator himself, that deduced under the will or that under the supposed deed of gift. The plaintiff, we think, has stated a sufficient equity in her bill; the demurrer must be overruled with costs, and the defendants must answer.

PER CURIAM. Decree reversed.

JOSEPH DEY et Ux. *v.* JAMES WILLIAMS et al.

A legacy is not taken as a satisfaction of a debt due the legatee, there being assets to pay both the debt and legacy, if there is a difference in their natures, or in the time when they are payable, or when one is certain and the other contingent.

Whether declarations of a testator to prove a legacy to be in satisfaction of a debt are admissible. Qu?

John Williams, the testator of the defendants, was the guardian of his grandchild, the feme plaintiff. He neglected to secure a debt due her by another of his grandchildren who had died, and the object of the bill was to charge his estate with its amount. The defendants in their answer admitted the case made by the bill, but set up as a defence the fact [67] that their testator (the guardian) had by his will given to the ward, after the death of his wife, a negro and a bed and furniture, and also one-fifth of the clear residue of his estate, which he declared to be in satisfaction of the debt due her, and the defendants relied upon these facts as a bar to the plaintiffs. Subject to this defence a reference had been made in the court

below, and the sum of $200 61 was reported to be due the plaintiffs. No exception was filed to this report.

Kinney, for the plaintiffs.

Heath, contra.

Gaston, Judge.—The court cannot decree that the legacies bequeathed to the plaintiff Elizabeth were given in satisfaction of the debt due to her by the testator. The first bequest to her is of a negro girl, a bed and furniture, but not to take effect in possession until after the death of the testator's wife. The other is of a share of the proceeds of certain negroes directed to be sold, and of the general residuary estate, expressly subject to the payment of the testator's debts, and to a life-estate of his widow. A legacy is not presumed to have been intended in satisfaction of a debt due by the testator to a creditor legatee, where there is no deficiency of assets to pay both debts and legacies, if there be a difference in the nature of the debt and legacy, or a difference in the times when they are respectively payable, or where the one is certain and absolute, and the other contingent and uncertain. The answer indeed avers, and offers to prove by testimony *dehors* the will, that the legacies were given in discharge, and because of the debt. We are not prepared to say that testimony for that purpose can be received, but we are not under the necessity of deciding the question, as no such testimony is to be found in the proofs.

Upon the pleadings and proofs there is no other matter presented for our determination. An account has been had by consent of the parties, and no exception has been taken thereto. The report therefore is to be confirmed, and the plaintiffs to have a decree for the amount thereof.

Per Curiam. Decree accordingly.

NOTE.—See, in support of the decision, 2 Williams on Executors, 805 to 807. A legacy, not expressed to be in satisfaction, or in lieu, of commissions, will not prevent the executor from claiming them. *Oden* v. *Windley*, 2 Jones' Eq. 440.

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[68] THOMAS TOMLINSON *v.* CHARLES SAVAGE et al.

After the parties have been at issue five years, an amendment to the bill will

not be permitted, which involves the necessity of additional proofs, when the answers gave the plaintiff notice of the defence which he seeks to avoid.

Upon a prayer for an amendment which amounts to framing a new bill, and taking new proofs, the course is to dismiss the pending bill without prejudice.

This was a bill to set aside a sale made under the order of a court of equity, for the purpose of partition. The gravamen of the bill was, that the title of the petitioners, at whose instance the sale had been ordered, had proved defective. In his bill the plaintiff had alleged, that one Thomas Blewett had not had issue by his wife, so as to constitute him a tenant of the land by the curtesy. This allegation was admitted by the defendants; but upon the hearing the plaintiff offered to prove that in fact Blewett had issue by his wife, and was tenant by the curtesy. This was objected to, and the objection was sustained. There were other defects in the bill which need not be stated.

Mendenhall, for the plaintiff, read affidavits setting forth the truth of the plaintiff's case, and moved to remand the cause for the purpose of amending the bill, and taking additional testimony.

Devereux, for the defendants, showed cause against the motion.

Gaston, Judge.—This case came on for a hearing before us and was fully argued by counsel on both sides. It becoming apparent upon the hearing that the decree of the court would be against the plaintiff, it was prayed on his behalf that the cause might be sent back to the court from which it was removed, in order that the plaintiff might make material amendment in the frame of his bill, and have an opportunity of taking material proofs which it was alleged might be had, and with which the cause was unfurnished. We are disposed to extend every reasonable indulgence to applications which have for their object the more distinct and perfect ascertainment of the merits of a cause, but we think that we should be culpably indulgent if we granted this application. The bill was filed in September 1832, and contained an averment (which it is now desired to *contradict*,) that the wife of Thomas [69] Blewett died without having had issue by him. The an-

swer of Thomas and Jane Norwood, defendants having a common interest with the plaintiff, was filed in March 1833, and this answer apprised the plaintiff of the mistake he had made in regard to this allegation. After a delay of more than five years in asking leave to amend the bill, the application now made could not be granted on any terms short of the full payment of the costs. But in truth, to avail the plaintiff, if his remedy be by bill, *that* before us must be substantially modeled anew, and this can better be done by a new bill, than by any amendment. We will give the plaintiff an opportunity of doing so by permitting him to dismiss the present bill (without prejudice) and beginning *de novo;* but we can do no more for him. It is unnecessary to examine the other object intended to be accomplished by this motion, the arming of the cause with proofs in which it has been found deficient, as no proofs can help a defective and untrue statement.

The plaintiff has leave to dismiss his bill at his own costs, and file a new bill upon declaring his option to do so on or before the 25th of January next.

PER CURIAM. Decree accordingly.

NOTE.—Where a bill is defective in substance, amendments will not be allowed on the hearing in the Supreme Court; nor will that court, in such case, remand the cause for the purpose of an amendment in the court below, except under very peculiar circumstances; the practice being to dismiss the bill without prejudice, the plaintiff paying costs. *Williams* v. *Chalmers*, Busb. Eq. Rep. 75. The 17th section of the 33d chapter of the Revised Code has enlarged the power of the Supreme Court to allow amendments to be made in that court, or to remand the cause, when necessary, for the purpose of being amended in the court below.

LEVI FAGAN et al. *v.* CALVIN JONES et al.

A legacy to A of $2000, "or the value thereof in property," is a general legacy, and passes under the residuary clause of the legatee's will, in which he disposes of "all his personal estate of what nature soever, consisting of my undivided share in the negroes &c. coming to me from my father's estate, as well as all personal property I may have acquired since my father's death," although the legacy vested before that event.

Joseph Webb, in the year 1819, made his will, by which he

bequeathed as follows: "I give and bequeath unto my favorite friends, William A. Bozman, Harriet Bozman and Joseph Bozman, children of Levin Bozman, $2000 each, or the value thereof in property, to them and their heirs forever." In the same terms he gave other legacies, and died in the year [70] 1823, when his will was duly proved. Levin Bozman, the father of the legatees above-mentioned, died in the year 1824, and in the year 1826, Joseph Bozman, one of the said legatees, made his will and bequeathed as follows: "In the first place, I give unto my sister Harriet my bed and bedstead, together with the furniture belonging to it. In the second place I give unto my brother William A. Bozman, all my personal estate of what nature soever; (except the donation above-mentioned to my sister Harriet,) whether consisting of my undivided share of negroes and money coming to me from my father's estate; or whatever else of personal property of my undivided share, as well as all personal property I may have acquired since my father's death, to him, his heirs and assigns forever." He died in the year 1826, and his will was duly proved.

The personal estate of Webb was insufficient for the payment of his debts and legacies; and his land was sold under an order of the Court of Equity for the county of Washington. The money raised by the sale of it being paid into the Clerk and Master's office, it was agreed that it should be paid to the plaintiff Fagan, if the Court should be of opinion, first that the legacy of Webb to Joseph Bozman was a general legacy, and secondly if it passed under his will to William A. Bozman.

A. Moore, for the plaintiff Fagan.

Heath, *contra*.

Daniel, Judge, after stating the facts as above set forth, proceeded as follows: It is submitted to us to say in the first place, whether the legacies given in the above recited clause of Joseph Webb's will are general legacies. We answer that they undoubtedly are general legacies. The words "or the value thereof in property," are to be considered only as a charge on the real and personal estate of the testator to satisfy those general

legacies. There is no particular part of the real or personal estate specifically devised or bequeathed. The testator has
[71] given in the same words legacies of different amounts to all the other legatees named in the will.

The second question is, whether that portion of the legacy of Joseph Bozman raised out of the sale of Webb's land, or any portion of the said legacy of $2000 to Joseph, passes under his will to his brother William. We have before stated, that the whole legacy of $2000 was a general legacy, and constituted a part of Joseph Bozman's personal estate. But as Webb, who gave the legacy, died a year before the death of Levin Bozman, (the father of Joseph,) it is urged that Joseph Bozman died intestate as to that portion of his personal estate acquired before his death. We think Joseph Bozman did not mean to die intestate as to any of his personal estate. Excepting the bed to his sister, he gave to his brother William all his "*personal estate of what nature soever.*" These are terms of the most comprehensive character, and are not to be restrained but by expressions manifesting a plain intent to narrow them down. The words superadded do not shew this intent. They are not a specification of the things whereof the personal estate given *does consist*, thus explaining and qualifying the general bequest, but a recognition of things constituting a part of that general bequest which the testator was apprehensive might be thought not to fall within it. The whole personal estate is bequeathed, *whether* it consist of the enumerated subjects or not.

It follows, that according to the agreement of the parties, the money which is the subject of controversy in this case is to be paid to Levi Fagan.

Per Curiam. Decree accordingly.

NOTE.—For the distinction between legacies, general, specific, and general in the nature of specific, see the case of *Graham* v. *Graham*, Busb. Eq. Rep. 291, where the subject is fully discussed.

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[72] JAMES HODGES *v.* DRURY HODGES, Ex'r, &c.

The act of 1797 (Rev. Stat. ch. 46, sec. 28,) empowering executors and administrators to convey land in certain cases, is confined to sales of land for which

the vendor had executed a bond with a condition to convey, and had died before performance. It does not extend to agreements to convey made upon other considerations, nor to a case where a deed was executed in performance of the condition, and lost after the death of the vendor, and before its registration.

The loss of a deed after the death of the vendor, and before its registration, can only be supplied by a decree directing the heir or devisee to execute another.

Under the act an executor is not compelled to execute a deed unless the vendor, or his heir or devisee, would be bound to a specific performance; any defence to the latter, as want of consideration, &c., is available to the former.

A decree for a specific performance cannot be obtained upon a bill against one of several heirs.

The bill was filed in March 1836, and charged, that on the 14th day of August 1819, the plaintiff purchased a tract of land containing 280 acres from his father, Bartholomew Hodges, at and for the price of $100 then paid in a bond for that sum, which the plaintiff held on the father and delivered up: that the land was to be conveyed in fee at or before the death of Bartholomew; and that to that effect Bartholomew then gave to the plaintiff his bond in the penal of $1000, which the plaintiff had caused to be proved and registered shortly before the filing of the bill. The bill further stated, that some years afterwards—in 1826—Bartholomew, the father, made his will in due form to pass personal and real estate, and thereof appointed two of his sons, Drury Hodges and Moses Hodges, the executors, and died in 1831; that Drury alone proved the will, and undertook the office, as Moses then resided, and has ever since been, out of the State. The bill further stated, that five or six days before the death of the father, he executed to the plaintiff three several deeds of conveyance for the different parcels which made up the tract of land purchased by the plaintiff, which were duly attested by two or three witnesses, and delivered by the father to the plaintiff: that they were received by the plaintiff, and deposited by him and his mother in a family chest with the deeds to his father for the same land, and other valuable papers, and that the mother locked the chest and kept the key: that soon after the death of his father he asked for the key of the chest in order to get the deeds, and was informed it was lost; but that afterwards it was found and the chest was subsequently opened by the mother, who was since dead, and by Drury the executor, who admitted that he found therein the

deeds to his father, but pretended that there was no such paper therein as a deed from the father to the plaintiff, and if
[73] the same was in his possession, refused to deliver it or them up, or give any information upon the subject. The bill therefore prayed a discovery from Drury respecting the execution of the deeds to the plaintiff, and whether they were or ever had been in his possession, or under his control, and if so, that he may produce them; or if they have been destroyed or cannot be accounted for, that the plaintiff might be declared to be entitled to a specific performance of the bond, as articles, and that the executors, Drury and Moses, might be decreed, in fulfilment thereof, to convey to the plaintiff in fee.

Process was prayed in the bill, and was taken out against, and served on, Drury Hodges; but none was prayed or was taken out against Moses, nor any advertisement made as to him.

Drury put in an answer, which admitted that his father and testator gave the penal bond, but denied that it was upon the consideration of $100, paid in a bond of the testator, or otherwise, or that any thing was paid, or contracted to be paid. He stated that his father and mother were old and infirm, and the plaintiff, then grown up, was their youngest son; and that the father was desirous to have his small property managed by one of his sons so as to provide a comfortable maintenance for himself and his wife during their lives, and told the plaintiff he would give him the land at his death, if he would undertake it: that the plaintiff agreed to undertake it, and thereupon his father gave the instrument alleged in the bill. But that the plaintiff very soon deserted his parents and lived several miles off in idleness, giving no attention to his parents or the plantation, and that his father had in reality to maintain him in part: that about seven years afterwards the father, considering the agreement abandoned, made his will, in which he gave the use of all his estate to his widow during life, and directed it to be divided equally between all his children, eleven in number, of whom the plaintiff was one, besides giving another legacy of $100 to the plaintiff. The answer denied that the plaintiff ever had a bond on his father for $100, or any other sum, or that he had in 1819 any property, as the defendant believed.

The answer further denied all knowledge of any deeds or

deed executed by the father to the plaintiff; but admitted that the defendant had heard and believed that the [74] plaintiff did obtain, or attempt to obtain, such instruments from his father just before his death in 1831. It denied, however, that, if obtained, they were valid; and stated the transaction to have occurred just before the death of the father, while *in extremis*—so much so as not to be able to understand what he was about, or to write his name, or even hold the pen himself, but that he was assisted to make his mark mechanically by having the pen put in his fingers, and then moved by another person. The answer further denied that the deeds or either of them ever came to the custody of the defendant, or under his control or disposition, or of any person to his knowledge or belief, other than the plaintiff himself, or that they were deposited in the chest as alleged in the bill. The answer stated the belief of the defendant that they were kept by the plaintiff himself and have been suppressed, either because they were never fully executed, or because, if executed, they were not valid in law under the circumstances, and the plaintiff was afraid or ashamed to rely on them.

The answer then submitted whether, upon the case stated in the bill, the defendant could, as executor, make a proper conveyance to the plaintiff, and insisted that his relief, if any, was against the heirs at law.

Neither party exhibited the will of the father. The plaintiff examined several witnesses to establish the execution and attestation of the deeds in 1831, who testified distinctly to the *factum* of the instruments, and likewise rendered it probable that at that time they were put into the chest by the plaintiff or his mother; and no account was afterwards given of them. The witnesses however spoke in terms of doubt of the capacity of the father at the time to make or execute any contract, and none of them deposed to any consideration paid or mentioned between the parties, or in the deeds themselves.

The subscribing witness to the bond of 1819 was also examined by the plaintiff, and failed to prove any sum paid, or any bond for $100 or other sum given up by the plaintiff. He stated that there was some agreement about [75] maintaining the old people out of the property, and that

he reduced it to writing at the same time that he did the bond; but he did not state its contents, nor did they otherwise appear.

Boyden, for the plaintiff.

J. T. Morehead, for the defendants.

Ruffin, Chief Justice, after stating the facts as above set forth, proceeded: The plaintiff, we think, has failed to make out a case on which he can have a decree on his present bill. Supposing the deeds to be valid, either as covenants to stand seized or as bargain and sales, the Court would supply the destruction or loss of them, before registration, by decreeing others to be made. But it could be done only against the heirs or devisees, in whom the title is. The defendant denies all knowledge of them, and they are not traced to him or any other person. There can, then, be no decree for their production; but only for the execution of others. The act of 1797, Rev. Stat. 279, authorizes executors "to execute deeds for any lands that may have been *bona fide* sold by the deceased, and for which he has given to the purchaser a bond to convey the same." The deed which was executed and has been lost is not within the meaning of the words, "bond to convey," because by a subsequent provision of the act, the executor can only convey when the bond has been proved and registered. Besides, the power to the executor is only to convey lands "sold by the deceased;" and there is no evidence that the deeds of 1831 even professed to be of that character. If the Court were at liberty to give a liberal construction to the act, this part of the transactions would not bring the case within it.

The draftsman of the bill was aware of this, and therefore sets out the original bond and prays for a conveyance from the executor as a specific performance of that. But the plaintiff has not fewer or less serious obstacles to relief on this, than on the preceding point. In the first place, the act manifestly points to the case of the contract resting in articles, or being an executory agreement, as a bond, at the death of the vendor; and one founded on a pecuniary consideration. Now this agreement had, according to the statement of the bill,
[76] been fulfilled by the testator himself; and there were,

in a legal sense, no obstacles, no bond to convey; for the conveyance had been already made. The purpose of the bond was answered, and its obligation gone by performance.

But if no deed had been made by the father, the bill and the evidence are not sufficient to put the act into operation. It is not the meaning of the statute that the executor should be obliged, or have power, to convey, where the deceased or his heir or devisee would not be bound to do so. To raise the duty in the latter class of persons there must be a valuable consideration stated in the pleadings and proved, and such acts of the vendor as amount to performance of the contract on his part or an offer to perform. Indeed, as has been already noticed, the act is confined to land sold. The bill alleges a consideration of $100, paid in a bond of the father cancelled. The answer denies this as positively as an executor can deny an allegation, both as to the circumstances and substance of the allegation. It would require the opportunities of a personal agency in a transaction to deny the allegation more precisely. Of this important fact, thus put in issue, the plaintiff has given no evidence—on the contrary the testimony of the person who wrote and witnessed the bond tends to sustain the answer in this point. That witness speaks of an instrument to secure a support to the plaintiff's parents; but enough does not appear respecting its provisions to support the contract, if it were consistent with the statement of another consideration in the bill. It does not appear whether it was a mere reservation of a support for the mother out of the property, or an independent covenant on the part of the plaintiff absolutely to maintain his parents, or either of them; and if it were the latter, there is not the slightest reason to believe that the plaintiff did a single act in compliance with it for a period of upwards of sixteen years, which elapsed between the agreement and the commencement of this suit. The bill, however, puts the contract on the pecuniary consideration of $100; and it is enough to say, that is denied and not proved, but rather disproved. There could not therefore be a decree, founded on the agreement alone, if the bill sought it against the heirs or devisees: much less can it be against the executor. [77]

It might not be material in what character the de-

fendant was brought before the Court, if the plaintiff was entitled to relief against him in any capacity without bringing in others. But although the defendant is an heir as well as executor of his father, it is stated in the answer that there are nine other children, and it appears in the bill that there is, at least, one other son, Moses Hodges, whom it is necessary to bring before the Court, in this aspect of the case. The bill might stand over to make parties; but it could not be amended in that respect without making it substantially a new bill, which could not be allowed without the payment of full costs. It is better the plaintiff, if he chooses to proceed in the litigation, should begin *ab origine;* and therefore this bill must be dismissed with costs.

PER CURIAM. Bill dismissed.

NOTE.—The act of 1797 (see 1 Rev. Stat. ch. 46, sec. 28,) is contained in the Revised Code, ch. 46, sec. 37.

Under the act of 1797, the person who claims to have such a conveyance made by an executor or administrator, must show that there was a valuable consideration for the contract of the deceased, and that such consideration was paid, or such acts done, or offered to be done, on the part of the purchaser, as were equivalent, under the contract of the parties, to a payment of the consideration. *Lindsay* v. *Coble*, 2 Ired. Eq. Rep. 602.

As to the question of setting up lost unregistered deeds, it has been *held*, that a deed, whether for a valuable consideration or not, but good and effectual at law except for want of registration, and which is lost before registration, will be set up in equity, and a decree be made for another conveyance by the bargainor or his legal representatives. But before such decree can be made, the plaintiff must clearly prove that such a deed once existed, its legal operation and its loss. *Plummer* v. *Baskerville*, 1 Ired. Eq. Rep. 252. See also *Thomas* v. *Kyles*, 1 Jones' Eq. Rep. 302.

JAMES BURKHEAD et Ux'r. *v.* MILDRED COLSON et al.

Where a slave, specifically bequeathed to a female infant, was mortgaged by the executor, it was held that a lapse of forty years barred the right of the executor to redemption, and that the executor being barred, the legatee was also, notwithstanding her infancy and subsequent coverture.

A Court of Equity has no jurisdiction to declare a deed void, because of the infancy of the grantor; the remedy at law being plain and direct.

If chattels specifically bequeated be mortgaged by the executor, he is a necessary party to a bill by the legatee for a redemption.

The plaintiffs, in their bill filed in the year 1826, alleged that James Muse, the father of the *feme* plaintiff, in the year 1780, made his will, and thereby bequeathed to his said daughter a female slave, to be delivered to her on her attaining the age of sixteen, or her marriage, and thereof appointed his wife and son Jesse, executors, who proved the same at the January Term 1782, of Cumberland County Court: that shortly afterwards the executors mortgaged the slave to Joseph Colson, who had notice of the will of the testator: that the plaintiffs were ignorant whether the conveyance to Colson was on its face a mortgage or not, but they insisted that the negro was either by stipulation expressed in the deed, or by an ex- [78] press parol engagement, subject to redemption: that this took place when the *feme* plaintiff was under age: that some time thereafter, and while she was still under age, Colson surrendered that deed, and by artful contrivances obtained an absolute conveyance for the same slave from her: that shortly afterwards, and also before she attained the age of twenty-one, the plaintiffs intermarried.

The bill then charged that the defendants, claiming as volunteers under Joseph Colson, were in possession of the negro and her issue, and prayed a discovery of their names, sexes and ages, and an account of their hires, and that they might be delivered to the plaintiffs.

The defendants in their answer put the plaintiffs to the proof of every thing alleged in the bill, denying all personal knowledge of the facts, as they had taken place fifty years before: they stated that they had understood, that Joseph Colson had advanced a sum of money equal in value to the negro bequeathed to the *feme* plaintiff, and had taken her into his possession, and that the negro and her offspring has ever since continued in his possession, or that of his children; that they had also understood that Joseph Colson, fearing that the executors had not a right to sell the slave, had obtained from the legatee, after she came of age, a deed, and insisted that it was in all respects fair, being executed by her, with the intent to confirm his title, and upon a promise by the executors of making her a full satisfaction: that this satisfaction was made by conveying to her a tract of land, and delivering to her a

horse. The defendants relied upon the lapse of time, and the statute of limitations.

Replications were taken to the answers, and many depositions were filed, the substance of which is stated in the opinion of the Chief Justice.

The cause was argued by *Devereux*, for the plaintiffs, and by *Mendenhall* and *Winston*, for the defendants.

Ruffin, Chief Justice.—The plaintiffs cannot be relieved in this court upon the ground of the infancy of the wife when she executed the bill of sale to Colson of the 6th of December 1789, supposing her then to have the legal title to the
[79] slave, by the assent of the executors. If such were the case, the deed was void, as the act of an infant; and the remedy would be at law. The most favorable point of view in which the case can be placed for the plaintiffs, is that in which their counsel endeavored to present it, as being a bill of a legatee of a specific chattel to redeem a mortgage made by the executors. The deed of the plaintiff Charity is then to be regarded as a release of her right, as legatee, to redeem; and to be treated as inoperative, because she was under age when she gave it. Of her infancy at that time and at the time of her marriage, the evidence is satisfactory; and therefore, in our opinion, her rights are in no degree impaired by that instrument, as a conveyance or release simply.

Laying that part of the transactions aside for the present, the case appears to be this: In the year 1784, the plaintiff's mother and brother, who were the executors of her father's will, conveyed, for what is proved to have been a fair and full price, to Joseph Colson, a negro girl, which the father had given in his will to the plaintiff. One witness says, that by the contract between Colson and the executors the negro was redeemable; while another, a brother of the plaintiff, calls it a sale. If it was redeemable, there is nothing said by the first witness that enables us to say, whether the agreement for that purpose was contained in the deed of the executors, or was reserved by a separate instrument, or by parol. No security appears to have been taken by Colson for the money advanced by him; and he took immediate possession. But in 1789, either because he held

a mortgage only and wished to get the absolute title, or because it was thought the executors could not convey a slave bequeathed, but that the legatee only could do so, the first conveyance, whatever its character was, was destroyed, and a bill of sale was made by the legatee, then supposed to be of full age, but in reality about twenty years old, and was attested by one of the executors. The testator died indebted, and both personal and real estate were sold under judgments outstanding at his death and obtained afterwards. It might probably have been necessary for the executors either to sell or mortgage the negro for the payment of debts. But there is no positive proof of such necessity, nor any evidence of the actual ap- [80] plication by the executors of this money to that purpose. Nor, on the other hand, is there evidence that Colson knew, or had reason to believe, that the money would not be or was not duly applied in a course of administration. About the period of the execution of the deed by the plaintiff, her mother proposed to convey to her, by way of satisfaction, several articles of property; which the plaintiff declined accepting upon that footing, and expressed a wish to get her negro, as several witnesses on her part testify. After her marriage, however, the mother and brother, the executors, did convey to the husband land and a mare which he enjoyed and sold. These are distinctly proved to have been of greater value than the negro; and one witness says they were given in satisfaction for the negro, while another witness speaks to declarations to that effect by each of the plaintiffs.

The bill was filed in 1826, against persons who had the slave and her issue under the will of Colson, who was then dead; as were also both the widow and son of the testator. The answers do not positively deny that the negro was at first mortgaged, and it is rather to be inferred the defendants believe she might have been, although they set up the transaction as a sale, upon the grounds that the possession accompanied it and a full price was paid. But they state their ignorance of the particular facts, and the impossibility of ascertaining them, by reason of the deaths of the persons just mentioned, and the remoteness of the transaction; and insist upon those circumstances, and the great lapse of time, as a bar to the relief.

Upon the first blush of such a case as this, one feels that from its staleness it is entitled to no favor. It is now nearly fifty-four years since the supposed mortgage, which the plaintiffs seek to redeem. To the filing of the bill, it was forty-four years; and thirty-seven years from the last transaction respecting the negro, that namely, of the conveyance by the plaintiff to Colson. Every fact, therefore, which it is necessary for the plaintiffs to establish, ought to be clearly and fully established by them; and every fair presumption made against them.

Under the circumstances it might, therefore, be held,
[81] after the death of all the parties except the plaintiff, that the transaction was a sale, and a rightful sale by the executors; and also that the plaintiffs have received full satisfaction from the executors, to whom she looked, when she conveyed in completion of the title of the purchaser from them. But supposing the point of satisfaction to remain in doubt, and although the executors conveyed with that view that the plaintiffs did not accept *qua* satisfaction; and further, that there was unquestionably a mortgage and not a sale to Colson; yet at this day, the plaintiffs cannot, we think, redeem upon their present bill. The executors of the father are not made parties, nor is their assent to the plaintiffs directly established. The assent was inferred in argument from the length of time, and the attestation by the executor of the plaintiff's bill of sale to Colson. But time can only operate in favor of a possession consistent with the fact presumed from it; and here the possession remained with the alienee of the executor. The attestation by the executor of the legatee's conveyance may be evidence in most cases of an assent. But not in this case, in which the plaintiffs are obliged to suppose in their bill a fair mortgage made by the executors, to the very person to whom the plaintiff was conveying. It does not imply an intention that the legatee should defeat or redeem the mortgage; for the instrument attested rather implies a renunciation by the legatee of the right to do either. Without an assent of the executors, they are necessary parties for the protection of their own rights, and those of creditors. The case is not one in which the Court would be inclined to allow the case to stand over to make parties. But if an assent were established, and the necessity of

those parties were thereby dispensed with, the plaintiffs must come into court for a redemption upon the right of the executors, who made the mortgage; and not upon any original right in the *feme* plaintiff; which her infancy and coverture would save from the effect of laches. If a mortgagor assigns the equity of redemption to an infant, or married woman, the mortgagee is not to be in a worse situation thereby; and the assignee cannot redeem after his assignor is barred. The plaintiffs seek to redeem themselves, instead of the executors. But they have brought their suit for that purpose long [82] after one by the executors themselves could be entertained. Collusion between Colson and the executors is charged, as well as fraud and imposition by all of them on the plaintiff in obtaining a deed from her. If those charges had been sustained by proof, the Court might have been more ready to assist the plaintiffs to redress against both. But these charges have no shadow of foundation; and the application, in its only shape, is a naked one for redemption by the legatee of a mortgage fairly made by the executors, where the mortgagee has been in possession, and no notice taken of the mortgage, for upwards of forty years. The time is a full answer to the executor in such a case; and must be so also to the legatee, with or without the executors being before the Court; and this is especially so where the executors never intended to transfer their title to the legatee, but in fair probability, at the least, otherwise made the legacy good to her. The bill must therefore be dismissed with costs.

PER CURIAM. Bill dismissed.

NOTE.—The right to redeem personal property is now limited to two years by the 16th section of the 65th chapter of the Revised Code; and by the 19th section of the same, the presumption of payment, or the right of redemption of mortgages of real property, shall arise within ten years after the forfeiture of the said mortgages, or last payment on the same.

THOMAS McLIN *v.* ROBERT McNAMARA, Adm'r of STEPHEN FERRAND.

A promise to settle an account is an admission of a subsisting liability, and an engagement to pay any balance which may, upon the settlement, be found due, and repels the plea of the act of limitation.

The cases of *Ballenger* v. *Barnes*, 3 Dev. 460, and of *Blount* v. *Porterfield*, 2 Hay. 161, approved.

A series of consignments on one side, and of payments on the other, gives jurisdiction to a court of equity for an account, although one transaction would not be sufficient.

A suit in equity is commenced when the bill is filed, and not when the subpœna is issued.

To entitle an administrator to the benefit of the act of 1789, (Rev. Stat. ch. 46, sec. 16,) advertisement of his qualification, at the court house door, is necessary, and is not supplied by publication in a newspaper printed in the county.

The plaintiff resided at Newbern, and the defendant's intestate at Salisbury. The former had sent to the latter various invoices of goods for sale, and had purchased for him household furniture. The defendant's intestate had made sundry remittances to the plaintiff on these accounts; and the latter, in July 1829, wrote requesting an account of sales, and also for a remittance of the balance due him; complaining "that the accounts between us have really remained unsettled longer
[83] than I could have wished." In reply to this letter, Ferrand, on the 5th of October 1829, wrote as follows: "I should like to have a settlement with you, to know if I am in due to you, and for the purpose of so doing, I shall visit Newbern in the winter, where I expect to remain several months." The plaintiff, in April 1830, wrote to Ferrand, complaining of his not coming to Newbern according to his promise, insisting upon having an account of sales, and asking permission to draw. Ferrand died in November following. The bill charged the facts above set forth, and prayed for an account.

The defendant in his answer admitted that there had been many business transactions between the plaintiff and his intestate, but denied any knowledge of their particulars. He relied upon the act of 1789, for the protection of executors and administrators, and the act of limitations.

The bill was filed on the 26th of September 1832, and it appeared from the record, that process had issued returnable to the ensuing October Term of the Court of Equity for the county of Craven. Upon the act of 1789, the proof was that the defendant had made the advertisement required by that act in two newspapers published in the town of Salisbury—no proof was offered of any advertisement at the court house, or at any other public place in the county of Rowan.

Badger, for the plaintiff.

Caldwell, and *J. H. Bryan*, for the defendant.

DANIEL, Judge, after stating the case, proceeded as follows: The defendant's counsel contend, *first*, that the accounts are not mutual, but are all on the side of the plaintiff, and that he should have proceeded at law. We think this objection is not tenable. We admit, that to entertain a bill in equity for an account, there must be *mutual demands;* a series of accounts on one hand, and a series of payments on the other, and not merely one payment and one receipt. *Dinwiddie* v. *Bailey*, 6 Ves. 136; 9 Ves. 473; 1 Mad. C. P. 86. But here the bill expressly charges and the answer admits, that there were a series of accounts by the plaintiff, and sundry payments by Ferrand.

Secondly, the defendant relies on the act of limitation. [84] We are of opinion, that this act does not bar the plaintiff. On the plaintiff's demanding a settlement of accounts, Ferrand (on the 5th of October 1829,) answered by letter and said, "I should like to have a settlement with you to know if I am in *due* to you, and for the purpose of doing so I shall visit Newbern in the winter." The bill was filed on the 26th of September 1832, and thereupon, as appears from the record, process issued returnable to the October Term 1832.

The promise, to take the case out of the statute of limitations, must be either an express one, or amount to a clear admission of a still subsisting liability. *Ballinger* v. *Barnes*, 3 Dev. 460. But a promise to the creditor by the debtor, to account or settle, "to know if I am in *due* to you," is, we think, a promise to pay the balance, if on settlement there shall be a balance due from the promiser. Why settle, if the balance is not to be paid? The letter of Ferrand was dated within three years of the time of filing the bill—and within three years before "process issued" to the October Term 1832. The statute declares, that all actions which shall be sued or brought, shall be *commenced* or *brought* within the time and limitation in this act expressed, and not after. In equity, is the *commencement* of the action the filing of the bill, or is the action commenced only from the issuing of the process? Our act declares, that no

writ shall be served by the sheriff unless he has a copy of the bill ready to deliver to the defendant. Rev. Stat. ch. 32, sec. 4. In England, by the Stat. 4th and 6th of Anne, no subpœna shall issue till after the bill is filed. It is, however, there a frequent but irregular practice, to sue out a subpœna before the bill is filed, and file the bill before the return day. 2 Mad. C. P. 197. The filing of the bill, it seems to us, is the commencement of the action, within the meaning of the statute. The subpœna and copy are but as process emanating or issuing from an original, and not the commencement. But however that may be is immaterial in this case, as not only the filing of the bill but the issuing of the process thereon was within three years after the date of the letter. We therefore are of the opinion, that the act of limitations is not a bar to the plaintiff's claim.

[85] The act of 1789 imposes as a condition on an executor or administrator, an advertisement *at* the court house and at *other* public places in the county. It has been held that advertisement published in a newspaper printed and circulated in the county is a substantial compliance with that part of the law requiring advertisement at *other public* places. *Blount* v. *Porterfield*, 2 Haw. 161. But it is not a substitute for the positive requirement of advertisement at the court house.

The plaintiff is entitled to have an account.

PER CURIAM. Direct an account.

NOTE.—Upon the question of the statute of limitation (see 1 Rev. Code, ch. 65, sec. 3,) it is clearly established that when the promise to settle is used in the sense of accounting together, and striking a balance by computation, it will take the case out of the operation of the statute; for when so used, it implies a promise to pay. *Moore* v. *Hyman*, 13 Ired. Rep. 272. But when it is used in the sense of "to pay," then it will not prevent the bar of the statute, unless the promise is certain, or capable of being reduced to a certainty, and the claim sued on be identified as that in regard to which the promise is made. *Shaw* v. *Allen*, Busb. Rep. 58; *Loftin* v. *Aldridge*, 3 Jones' Rep. 328.

That one item alone will not sustain a bill in equity, see *Howard* v. *Jones*, 5 Ired. Eq. Rep. 75.

That the filing of a bill in equity is the time of the commencement of the suit, see *Aston* v. *Galloway*, 3 Ired. Eq. Rep. 126. The act of 1789 (see 1 Rev. Stat. ch. 46, sec. 16,) is contained in the Revised Code, ch. 46, sec. 22. An administrator who pleads the act must show clearly, by proof, that he advertised within two months, at more than one public place in the county. *Gilliam* v. *Willey*, 1 Jones' Eq. Rep. 128.

WILLIAM R. LINDSAY et al. v. JOSEPH H. WILSON et al.

Where neither of two assignees has the legal title, their respective rights are governed by the priority of their assignments; and where a debtor placed bonds and accounts in the hands of an agent, and directed him to pay certain debts from his collections, and solicited and procured from the creditors their acceptance of this security, and afterwards assigned all his debts to a trustee for the benefit of other creditors, it was held that the trustee took only the residue left after payment of the debts mentioned in the directions to the agent.

This cause was heard on bill and answer, and from them the case appeared to be as follows: Hoskins, the intestate of Lindsay, being induced by ill health to close a mercantile business which he had carried on in Charlotte, proposed to place his bonds and accounts for collection in the hands of Mr. Morrison, a practising attorney of that place. His object was to have the debts speedily got in, and also to provide for the security and payment of certain of his creditors, so that they should feel satisfied. He accordingly, on the 20th day of November 1833, left with Mr. Morrison evidences of debt to the amount of $10,917 21, and took his receipt therefor. He then drew an order on Morrison in favor of Carson for $950, payable out of the first moneys that might be collected on those debts, which Morrison accepted on the 30th day of November 1833, and afterwards took up, partly with cash and partly with his own bond. On the 3d of January 1834, it was agreed between Hoskins and Morrison, that the latter should apply certain of the bonds to the satisfaction of a debt to himself; [86] and Hoskins gave written directions to Morrison to pay out the moneys as he should collect, to certain other creditors named, debts to the amount of $2,879 87. On the 6th day of the same month Hoskins gave similar directions in favor of other creditors mentioned, to the further amount of $3,239 58, making in the whole the sum of $7,069 45. Hoskins instructed Morrison to inform the creditors respectively of the transaction, and obtain their approbation of the security provided for them and their assent to the arrangement. Immediately thereafter Mr. Morrison gave personal notice to such of the creditors as lived in the vicinity, and addressed letters of advice to

the others, who were the principal creditors, and were merchants resident in Baltimore and New York. The creditors here assented at once, and those at a distance returned replies assenting to the arrangement and accepting the security in Morrison's hands. The particular dates of those replies did not appear; but if given in the course of the mail, would have been received during the month of January 1834; and those creditors took no steps against Hoskins, but relied on the security held for them by Morrison.

On the 20th day of February 1834, Hoskins, by a deed of trust, executed by himself and the defendant, Mr. Jones, and not by any of the creditors thereby provided for, conveyed certain estates to Mr. Jones, and also assigned "all the debts due to him (Hoskins) now in the hands of Mr. Morrison for collection," upon trust to raise money therefrom to pay certain debts therein specified. At the time of executing this deed, Hoskins delivered to Mr. Jones the receipt given by Morrison, and informed the trustee and creditors of the instructions he had given for the prior payment of the other debts, namely, $7,069 45, thereout in the first place; and about that time Hoskins also wrote to Mr. Morrison from Guilford county, of the assignment he had made, and advised him that, after discharging the said debts to which the funds had been previously specially appropriated, it would be his duty to pay the surplus to Mr. Jones as trustee for the benefit of the other creditors. Soon after Hoskins died insolvent. Lindsay administered on his
[87] estate and demanded the evidences of debt from Morrison, who refused to deliver them up, on the ground that he held them as a security for the creditors mentioned in the instructions of Hoskins to him, who looked to him for payment thereout, and also as an indemnity to himself against loss from his promise to those creditors to use diligence to collect the debts and pay them thereout as collected. Lindsay then forbad Morrison the use of his name to institute suits. But it was afterwards agreed between them, that Morrison should proceed in the collection in the name of the administrator, and that the rights of the respective parties and creditors should be submitted to judicial determination. A considerable sum was accordingly collected, but not enough to discharge the debts of

which Hoskins directed the payment by Morrison; and it was not expected that more would be collected, as the other debtors were supposed to be insolvent.

Mr. Jones sold the specific property conveyed to him, and accounted with the creditors mentioned in the deed, and paid over the whole proceeds in part of their demands.

The bill was filed by the creditors mentioned in the deed of the 20th of February 1834, and by the administrator of Hoskins, against Mr. Jones and the executor of Mr. Morrison, for an account of the moneys collected by the latter, and prayed to have it declared that those moneys ought to be applied in the first place to the satisfaction of the creditors who are plaintiffs, and the surplus paid to Lindsay, the administrator of Hoskins.

Mendenhall, for the plaintiffs.

W. A. Graham and *J. T. Morehead*, for the defendants.

Ruffin, Chief Justice, after stating the facts as above, proceeded as follows: The plaintiffs are entitled certainly to a reference for the purpose of ascertaining the state of the funds in Morrison's hands, and of the debts to which they are applicable; and they must have it, if they choose to run the risk of the expense of it, should the inquiry turn out against them. With the view of ascertaining the utility of proceeding to take an account, the hearing was brought on upon the single [88] question: which set of the creditors—those whom Mr. Morrison was to pay, or those for whose benefit the assignment was made to Mr. Jones—are entitled to be first satisfied out of the fund in the hands of the former. This course was adopted, as it was understood by the Court, because, if that question be decided in favor of the former class, all the fund that is available will be exhausted without satisfying them, and the plaintiffs would deem it useless to proceed further in the cause.

Upon the particular point discussed, the Court is clearly of opinion against the plaintiffs. Neither class of creditors nor their trustee have a legal assignment of the debts from Hoskins. Accounts cannot be so assigned; and bonds and notes can only be by endorsement. They both, then, claim by equit-

able assignments. Each of them is valid against the representative of Hoskins; and as between each other, the rule is, that which is prior is preferable. It may, though, be at once remarked, that as far as Mr. Morrison satisfied the specified debts by applying the funds to their payment, or by discharging Hoskins by taking up his notes and giving his own, before the execution of the deed to Mr. Jones and notice of it, the transaction stands upon sufficient grounds to support it, without reference to the doctrine of an equitable assignment to the creditors. It was an actual appropriation and payment of Hoskins' money, by his direction, and to his use. This includes the debt to Mr. Morrison himself, to Carson, and to any others in the like situation. With respect to the creditors who were not paid, the question is, whether what passed between Hoskins, Morrison, and those creditors, gives them a lien on this fund anterior to the assignment of the 20th of February 1834. We think it undoubtedly does. The evidences of debt were deposited with the intention that they should be a security for those debts. If that were not sufficient until rejection by the creditors, yet when this deposite and the purpose of it were, upon the request of Hoskins, communicated to the creditors, and their acceptance of it as a security solicited, and they did accept it, we must hold it to amount to an assignment in this Court. All parties so intended and understood. The credi-
[89] tors took no other means of collecting or securing their debts, but urged diligence on Mr. Morrison, and a speedy payment by him. Hoskins had every reason to be satisfied that it should be so regarded by them, as well as himself. That he considered the fund thus far specially appropriated, is clear from his communication to his other creditors at the time he made the deed of trust. If he could have countermanded his instructions to Morrison, viewing him simply as his own attorney and agent, it is certain that he did not intend to countermand them, and that he did not then look upon Morrison as his agent only, but as a person authorized to act on behalf of the creditors who had accepted, and to hold the fund for their benefit. The deed is expressed in the comprehensive terms, "all the debts in the hands of Morrison," because, if they proved good, there would still be a considerable surplus, nearly

$4,000. But he told them that he had given orders for the payment thereout of the other debts, and that they could only get the residue after the satisfaction of those debts; and to that effect he gave information to Mr. Morrison within a few days. It is not stated precisely when the several creditors acceded to the arrangement; but it must be presumed they had all done it prior to the 20th of February, because it appears they were written to early in January and returned answers, and in due course of mail all the answers could have been received before the expiration of January. Their assent, however, is to be assumed, until the contrary is shown, which is not pretended. The deed of trust was therefore taken with express notice that it was the intention of Hoskins that the class of debts mentioned in the instructions to Morrison should be first paid; and if there were nothing else in the case but the instructions and this notice, it would postpone those claiming under the deed of February. It makes it an assignment of the balance after the payment of the other class of debts.

It must therefore be declared, that the plaintiffs are not entitled to any part of the fund placed in the hands of Morrison, until all the debts mentioned in the instructions to him shall have been first fully paid. If the plaintiffs do not proceed to draw up an order of reference within a reasonable time, say on or before the 1st of February next, the bill must [90] then stand dismissed with costs.

PER CURIAM. Decree accordingly.

NOTE.—See *Allen* v. *Smitherman*, 6 Ired. Eq. Rep. 341, and *Wallston* v. *Braswell*, 1 Jones' Eq. Rep. 137, in both of which the principle of the present case is recognized.

GEORGE COOPER and HENRY ARRINGTON *v.* LITTLEBURY WILCOX et al.

Between the creditor and a surety, the former is not bound to active diligence to protect the latter; but if by his act he deprives him of a security, the latter is *pro tanto* discharged; and where, upon an appeal from the County to the Superior Court, the judgment was affirmed, and execution issued against the defendant and the sureties to the appeal bond, and was levied upon property

of the principal debtor sufficient to satisfy it, and the plaintiff discharged the levy, he discharges the sureties.

The rights of a surety to protection are recognized in all courts, if his character as a surety can be averred; as at law, in cases between the holder and drawer of a bill, if the former release the acceptor he thereby discharges the latter.

After the plaintiffs had failed in establishing their defence at law, (vide the case of Binford *v.* Alston, 4th Dev. 351,) they filed their bill praying that the money which they had been compelled to pay in satisfaction of the judgment might be restored to them.

The material facts were, that an action was brought by the defendant Wilcox, in the name of Binford, against the defendant Alston, in the County Court of Nash, and judgment being obtained against Alston, he appealed to the Superior Court of Nash, and the plaintiffs became his sureties for prosecuting the appeal. Alston having failed in the Superior Court, judgment was there rendered at the September Term of 1827 in favor of Binford against Alston and the plaintiffs his sureties, and an execution issued against the property of Alston and the plaintiffs, returnable to the succeeding April Term. This execution was levied upon property of Alston sufficient to satisfy the judgment. When the return day of the execution was at hand, and the sale about to take place, the defendant Wilcox, upon the prayer of Alston, and without the knowledge of the plaintiffs, directed the sheriff to forbear the sale, and return the execution indulged upon Alston paying the costs, sheriff's commissions, and $128 06 in part of the debt. Upon this arrange-
[91] ment being made, the goods seized were left with Alston, and afterwards were either disposed of by him, or taken by other creditors and sold at execution. No further effort was made to collect the judgment until the summer of 1831, when Wilcox sued out a *scire facias* in the name of Binford to revive the judgment, and Alston having left the State and being utterly insolvent, it was adjudged that execution should issue against the plaintiffs thereupon. Under this execution they had been compelled to pay the judgment (with the exception of the sum so paid by Alston) and interest and the costs of the scire facias.

Devereux, for the plaintiff.

Badger and *B. F. Moore*, for the defendant Wilcox.

GASTON, Judge, after stating the facts, proceeded:—There is nothing in the relation of principal and surety between two persons directly liable to the creditor, which imposes on him the duty of active diligence against the principal debtor. Mere forbearance or delay in collecting from the principal debtor, furnishes no ground on which the surety can ask for exoneration. But if the creditor do any act for the ease of the principal, without the privity of the surety, by which act the surety is injured or exposed to injury, that act may be laid hold of for the surety's relief. One has not the right to be charitable at his neighbor's cost. The creditor stepping forward to relieve the principal, should remember the situation of the surety, and not extend this relief to his injury without his assent—unless he choose to release the surety. Accordingly it is well settled, that if the creditor, from benevolence or favor to the principal debtor, relinquish a security which he has for the debt, or give up funds in his hands applicable to its payment, the surety will be exonerated to the extent of that security or of those funds. Thus in *Mayhew* v. *Crickett*, 2 Swan 191, it was holden to be clear, that if a creditor takes the goods of the principal debtor in execution, and afterwards withdraws that execution, he discharges the surety *pro tanto*. So in *Law* v. *East India Company*, 4 Ves. 829, it was considered as incontestible, that where a creditor has a fund of a principal debtor sufficient for the payment of the debt, and gives it back to the debtor, [92] the surety can never afterwards be called upon. The creditor, by virtue of the seizure in execution, or of the deposit, becomes a trustee of the security so acquired, or of the fund for the benefit of all concerned, and is responsible to any party injured by unfaithfulness in execution of that trust. For it is a rule, that if he be not only creditor but trustee, *then* even his neglect, if it occasion the loss of that to the benefit of which the surety is entitled, will *pro tanto* discharge the surety. *Capel* v. *Butler*, 2 Sim. & Stew. 457, (1 Cond. Eng. Chan. Rep. 543.)

The application of the principle to this case seems obvious. After Wilcox had levied his execution on Alston's goods, *these*

became a *specific* and full security for the payment of the debt, and this security, out of benevolence to Alston, he has relinquished, or at all events has by his act rendered ineffectual. In justice he must be regarded as having thus *interfered* with the collection of the debt at his peril, and not at the risk of those who neither consented to the course pursued, nor were consulted respecting it. The principle is spoken of as one of equity, but it prevails in all courts where the relation of principal and surety can be recognised. It is in truth but a consequence of the moral injunction so to exercise one's rights as not to injure others. Accordingly, where from the nature of the instrument it appears that one man is surety for the debt of *another*, if the obligee defeats the condition of the bond, the surety is discharged. So where there is acceptor and drawer, and the holder releases the former, the latter cannot be held responsible. But the form of the security frequently puts it out of the power of any but a Court of Equity to apply the principle. Here there could be no relief *at law*, because by the form of the judgment rendered on the appeal bond, Alston and the plaintiffs were alike principal debtors. But in equity it was competent for the plaintiffs to show that they were sureties for Alston.

There must be a reference to inquire and report what moneys have been paid by the plaintiffs, and when and to whom paid, on account of their liability as the sureties of the defendant Alston, specifying how much was because of the debt and
[93] how much for costs. Until the coming in of that report the Court reserves the question whether the plaintiffs shall recover back any, and if any, what part of the costs incurred by them at law upon the scire facias. The Court holds them clearly entitled to restitution of all they have paid for the debt and interest thereon, and to recover their costs in this suit.

Per Curiam. Decree accordingly.

NOTE.—See, accordingly, *Nelson* v. *Williams*, post 118; *Smith* v. *McLeod*, 3 Ired. Eq. 390; *Pipkin* v. *Bond*, 5 Ired. Eq. Rep. 91; *Carter* v. *Jones*, Ibid. 196. But, it seems, that if a creditor have a judgment against a principal and surety, and the surety, without the consent of the creditor, takes out an execution and has it levied upon the property of the principal, that the latter may discharge the levy, by withdrawing the execution without discharging the surety. *Forbes* v. *Smith*, Ibid. 369.

RICHARD HINES *v.* GEO. E. SPRUILL et al.

Where a testator by his will gave to his two sisters all his land, "together with all cattle, horses and other appurtenances thereto, except so much thereof as will pay my just debts; which I think may be done from the growing crop;" and afterwards gave all his negroes to the same persons, it was held that the will did not create a charge upon any part of the property for the benefit of creditors, over and above that which the law affixes upon the whole personal estate.

In a bill of interpleader by the assignee of a legatee, in trust for the payment of specified debts against his *cestui que trusts*, and the creditors of the testator, as both sets of defendants are actors, it is necessary that the latter should have established their debts at law.

And in a contest between them the executor should be a party.

As should also all persons claiming a joint interest in the subject-matter of the legacy.

The general creditors of a decedent have no lien upon his assets in the hands of an assignee of a legatee, unless by force of some rule of equity, which charges him on account of fraud, trust, or the like.

Difference between charging personal property and land with the payment of debts: in the first case, as the creditors can subject *all* the personalty, the question is solely between legatees for an exoneration. In the second, the devise of the land is in trust for the creditors, and they have a specific lien.

The plaintiff in his bill set forth a deed of trust executed to him by Benjamin J. Spruill, on the 28th January 1834, whereby the said Benjamin, among other real and personal property therein mentioned, conveyed to him all his, the said Benjamin's undivided interest, whether in law or equity, to the tract of land whereon he resided, it being the same which was devised by John S. Ross, to his sisters, Margaret, then the wife of said Benjamin, and Eleanor P. Ross, and all his undivided interest, whether in law or equity, to certain negroes therein named, cattle, sheep, hogs, corn, fodder, pork and farming utensils, in trust to be sold for paying debts due from the said Benjamin to the defendant George E. Spruill and others, and of discharging the said George and others from certain responsibilities encountered for the said Benjamin. Sales had been made by the trustee, and he declared himself desirous of accounting for the proceeds to those who might be entitled to receive them, but that he was embarrassed and perplexed by conflicting claims set up to a part thereof, and he filed this bill

in order to have these conflicting claims settled. He
[94] stated that the undivided interest so conveyed by the deed of trust, had accrued unto the said Benjamin as follows: That John S. Ross, the brother of Margaret, the wife of the said Benjamin, and of Eleanor P. Ross, died in the year 1828, having duly made his last will and testament, and thereby, besides devising to his said two sisters the plantation whereon he resided and certain negroes to each of them in severalty, after the payment of his debts, which he thought might be paid out of the then growing crop, he gave all the remainder of the negroes to his said sisters jointly, and provided that they should remain on the plantation until his sister Eleanor should arrive at age, and then the property to be equally divided between them: that of this will, the testator appointed his father William Ross, and Edmund D. McNair, executors, of whom the former alone proved it and qualified as executor: that the said William sold enough of the property of his testator to pay the debts, and liquidated the same or the greater part thereof, by substituting his own notes, or those of others, in satisfaction thereof, and thereupon assented to the legacies, which went into the hands of the said Benjamin and Margaret his wife, and the said Eleanor, and had ever since been held by them: that William Ross had since died, and that Spencer D. Cotton & Co., and others whom he named, alleging themselves to be creditors of John S. Ross, claimed to have a lien on the undivided property so conveyed to him for the payment of their demands, and notified him that they should hold him responsible therefor. The prayer of the bill was, that the *cestui que trusts* under the deed to him, might exhibit and establish the amount of their respective claims under the said deed, and that the alleged creditors of John S. Ross might bring forward and establish their claims, and show what lien they had on that part of the estate of the said John which had been conveyed to him; that an account might be taken of the trust fund in his hands, and that he might be quieted and protected in the discharge of his trust.

The *cestui que trusts* answered, and exhibiting the amount of
their respective claims, denied that the claims of the al-
[95] leged creditors of John S. Ross were true in point of

fact; insisted that if they did exist in fact against any person, they were personal claims against William Ross, and contended that in any event they did not constitute any lien upon the property conveyed in trust to the plaintiff. The creditors also answered, admitted the will of John S. Ross, the qualification of William Ross as executor thereof, and the death of the said William, and said that since the death of the said William all the personal estate of the said John came to the hands of the said Benjamin J. Spruill and wife, and Eleanor Ross, the legatees in the will, to an amount more than sufficient to pay the debts of the said John; and they exhibited the debts due to them respectively. The defendants Spencer D. Cotton & Co. averred, that the said John, at his death, owed them $404 08 by note, and $189 62 by open account: that they furnished the said William, after the death of the said John, with articles for carrying on the farm and supporting the family of the said John, to the amount of $23 89; that on the 11th of September 1830, after the qualification of the said William, he executed to them his note as executor for $631 86, therein including all the said demands, and also one for $18 31 due from the said Margaret, now the wife of Benjamin J. Spruill, for necessaries furnished her: that upon receiving said note they surrendered to the said William all the evidences of their demands thereby adjusted, which evidences they charged to be under the control of the plaintiff, or of the said Benjamin: that they took the note under the belief that the executor could thereby charge the estate of his testator, and in good faith, and not losing sight of the funds in his hands, belonging to his testator, to discharge the same, for that it was perfectly known to them that the said William was insolvent, and he then owed them personally a large sum, which he was utterly unable to pay: and they insisted that in equity they were entitled to have satisfaction out of the estate of the said John, in the hands of the plaintiff and of Eleanor Ross. The defendant Dickens alleged, that the estate of the said John was indebted to him the sum of $72 50, due since September 1826, for a horse purchased by said John, by the direction and advice of his guardian the said William; also the sum of $84 10 for an account against the [96] estate of the said John, acknowledged to be just by the

executor, and for a medical bill of $118 30 for professional services rendered the estate of the said John, under the direction of the executor; and he claimed to have a lien in equity on the estate of the said John for the satisfaction of these demands. The defendant Benjamin Jackson averred, that while John S. Ross was a minor, an account was opened with Barnes & Jackson, (a mercantile firm since dissolved, the whole business and effects of which had been surrendered to the said Jackson,) by William his father, who was from time to time furnished with the means of carrying on the farm of the said John: that the said John was also during that time furnished with many articles or necessaries: that after his death the estate continued to be managed in the same manner for the benefit of the said Margaret and Eleanor, and the account continued with the defendant on the said terms, and in the same manner, by reason of all which he contended that he had a claim for the sum of $445 31 due from Margaret Spruill and Eleanor Ross in equal proportions. And all these defendants alleged that they did not believe that William Ross ever assented to the legacies to his daughters, the said Margaret and Eleanor, "inasmuch as the time had not arrived when either could take the share bequeathed to them." The defendant D. Richards answered that John S. Ross, some time before his death, opened an account with D. Richards & Co., of which firm the defendant was a member, and continued the same up to his death, a copy whereof was exhibited; that after his death his executor William Ross continued to deal with the said firm, and to buy for them such articles as were necessary for the decent subsistence of Margaret and Eleanor Ross, his *cestui que trusts*, and for the keeping up of the farm, and the proper management and support of the slaves thereon; and that the said firm also made advances in money, by the direction of the said William and of Benjamin J. Spruill, after his intermarriage with Margaret Ross, to pay overseer's wages and other charges on the farm, an account of all which was also exhibited. This defendant also alleged that E. D. McNair had, for a valuable consideration, assigned to Richards & Co. a claim which he had, because of money
[97] paid by him on a note which he had executed as surety with William Ross, for the hire of a negro employed on

the said farm: that Richards & Co. forbore from pressing their demands at the request of William Ross, who proposed to pay them off out of the profits of the farm; that at the time when these demands accrued no division had taken place between the legatees and devisees, and the slaves and land were worked under the superintendence of the said William, and this defendant insisted that as well the demands thus arising, as the amount of debt due from John S. Ross, at his death, were a charge upon the land and slaves aforesaid, prior to the disposition thereof by Benjamin J. Spruill.

The will of John S. Ross, filed as an exhibit, contained the following clauses, and they were the only ones bearing upon the question: "Imprimis. I give unto my two sisters Margaret and Eleanor, the plantation on which I now live, together with all cattle, horses, and other appurtenances thereto, except so much thereof as will pay my just and lawful debts, which I think may be done from the crop now growing thereon." "I give unto my sister Eleanor, negroes Lizette and her children; to sister Margaret, Sabina and her child, together with what others she may have. I wish also that they should have the remainder of my negroes, and that they should remain on the plantation until my sister Eleanor comes of age, at which time I wish the property divided."

A reference of the plaintiff's accounts was directed, with instructions to the commissioner to distinguish in his report the funds in the hands of the plaintiff arising from the sale of the property formerly belonging to John S. Ross, from those which were created by the sale of the proper effects of Benjamin Spruill.

Upon the coming in of the report, His Honor Judge Pearson, at Edgecombe, on the last circuit, by an interlocutory order declared that the creditors of John S. Ross were entitled to satisfaction out of the fund in the hands of the plaintiff, arising from the sale of his assets, which came to the hands of Benjamin Spruill, upon his intermarriage with Margaret Ross, and directed a reference to ascertain the amount of their debts. From this decree the defendant claiming under the deed of trust, prayed an appeal, which was granted. [98]

Badger and *Devereux*, for those claiming under the deed of trust.

No person appeared for the other defendants.

Gaston, Judge, after stating the case as above, proceeded as follows: As the appellees have chosen to submit the cause here without an argument on their part, and the decree contains no reference to the grounds upon which it was rendered, we are under the necessity of ascertaining these as well as we can by our own unaided suggestions. We much regret this necessity, since it is probable that considerations which influenced the judgment of the Court below, may altogether escape our notice. The decree we presume is founded upon the position that the legacies bequeathed to Margaret and Eleanor Ross were charged, either by express declaration of the testator, or by the law of this Court, with the payment of the testator's debts; and that therefore so much of the fund in the plaintiff's hands, as was produced by the sale of what had been Margaret's share in these legacies, ought to be applied to the satisfaction of these debts.

If this position be admitted to be correct, we are nevertheless met with a difficulty, which in the present state of the parties and pleadings we apprehend is insuperable. The bill is in the nature of an interpleader, in which the *cestui que trusts* on the one side, and the creditors of John S. Ross on the other, are the contending parties. Both of these parties are actors in the controversy, and each are to establish their respective claims. The latter base their claim to the subject matter in controversy on their being creditors of the said Ross, but the former deny the fact of their being creditors. It is indispensable then to the effectual assertion of this claim, to establish the legal existence and amount of the debts said to be charged on the estate of Ross; and how can this be done in a suit wherein there is no representative of Ross to litigate these matters? If a bill be filed to subject property in the hands of a third person to the satisfaction of a debt wherewith it has been charged by the debtor, it is essential that the debtor be a party thereto. *He* is primarily liable, and the thing charged
[99] is to be applied only in aid of that liability. Whether he be debtor or not, and if debtor to what amount, are matters which cannot be determined until he had an oppor-

tunity of being heard upon them. So if a bill be brought against third persons who have possessed themselves of the effects of a deceased person, which are liable for the satisfaction of his debts, the executor or administrator of the deceased must be a party thereto. The executor or administrator is the representative of the deceased—appointed either by the deceased, or by the public authority to stand in his place—to enter upon his goods and chattels—to have action against his debtors—to perform his obligations as far as the assets thus collected will be adequate—and then to make such a disposition of the surplus as he has directed, or if he has been silent, such a disposition as the law presumes him to have intended. The representative of the deceased debtor must therefore be heard on the question of debt or no debt. He who is intrusted with the effects with which debts are to be paid, and who, in respect thereof, is primarily liable for those debts, must be a party where the aid of the Court is invoked against persons or property that may be liable in aid of him, or of the effects in his hands. *State Bank* v. *Knox & McMorine*, and Ante 1 vol. p. 53. There is another, though a minor difficulty, because of the want of proper parties. The creditors do not claim that the disputed fund shall be applied to the satisfaction of their demands *in full*. They insist that it is part of what was bequeathed to Margaret and Eleanor Ross as tenants in common, and that it ought to be applied rateably, with the part which the latter has received, to the discharge of a burthen imposed upon the whole. It follows clearly, then, that Eleanor Ross should be a party to controvert the claim.

But upon the best consideration which we have been able to give to the subject, we have been brought to the conclusion that the specific articles bequeathed to Margaret and Eleanor Ross were not, in the proper sense of the term, *charged* with the payment of the testator's debts. Certainly our law wills that *all* the debts of a deceased person shall be satisfied to the full extent of *all* his property, both real and personal, and it has endeavored to make, and as we believe has made, effectual provisions for the accomplishment of this pur- [100] pose. But among these it has not charged the specific articles or subjects of property, with the debts. Even the heir

may alien before action brought, and although *he* may be liable to creditors for the value, they have no lien which enables them to pursue the land. Personal property is regarded as of a mutable and perishable character, and liens upon it are not readily *implied*. The executor or administrator is liable *by reason* of the assets—legatee or next of kin who have received their legacies or distributive portions, by reason of the obligation on them to refund—other persons obtaining the assets gratuitously, or by collusion, by reason of the fraud manifested by the act, or of the trust implied from it; but there is no *lien* in favor of general creditors of the deceased against his goods and chattels. When a creditor has obtained a judgment against an executor or administrator, and issued his *fi. fa.* thereon, then he acquires the same lien against the things liable to execution, as every other execution creditor has against the property of his debtor. And as equity follows the law, if nothing can be obtained by *legal* process, a Court of Equity will aid the creditor to enforce his judgment against things which that court regards as part of the debtor's estate, because of the lien so acquired by issuing the execution. *Angel* v. *Draper*, 1 Ver. 399; *Rambaut & Co.* v. *Mayfield*, 1 Hawks 86.

But a lien was probably considered as expressly created by the testator. From the terms of the decree, "that the creditors are entitled to satisfaction of their debts out of the funds in the hands of the plaintiff arising from the *assets* of John S. Ross," we collect that in the opinion of His Honor this charge was confined to the personalty bequeathed, and did not apply to the land devised in the first clause of the will to Eleanor and Margaret Ross; and if there be a charge created by the words, "except so much thereof as will pay my debts, which I think may be done by my crop growing thereon," we believe that it is confined to the cattle, horses and other appurtenances mentioned in this clause. These were the subjects immediately anteceding the exception. The fund which he supposed would be first appropriated, and which he trusted would be
[101] sufficient, was of the character of appurtenances—"the then growing crop." Creditors could not wait until his sister Eleanor might arrive at age, and until that time at least,

he contemplated that the plantation should continue entire, and the negroes, who are certainly given without any charge, were to remain thereon. We do not think that it was the purpose of the testator by the language here used, to *charge* any part of his property *to his creditors*. It is to be recollected that the supposed subject of this charge is personalty, and personalty of that kind which is peculiarly perishable. We are to bear in mind that all legacies are *by law* postponed to debts, and that *all* the personalty comes into the hands of the executor subject to the demands of the testator's creditors. When a testator, therefore, directs his debts to be paid out of a particular portion of a fund, all of which is by law primarily and directly applicable to the satisfaction of debts, the question is, as between the legatees of different portions of this fund, which shall bear the burthen of the debts. We must be careful not to be misled in the construction of words like these, by a supposed analogy to the English decisions on the subject of charging *lands* by will for the payment of debts. In that country lands are not (or at least were not when these decisions were made) liable for the payment of the simple contract debts of the deceased. He cannot alter the law and make them directly liable; but, having a right to devise his lands, he may devise them either absolutely, or subject to any reasonable condition. When therefore a Court of Equity collects from a will so executed as to be effectual to pass lands, that the testator devises that his lands shall be subject to the payment of all his just debts, they give effect to this will in the only mode by which it can operate. They hold that it is a devise in trust for the payment of debts—that the lands are by force of the will *charged* with the payment thereof. But we can find no case —no dictum—where in that country a testamentary disposition is made of chattels, subject to the payment of debts, that the liability of those chattels *to the creditor* is in the slightest degree affected thereby. The testator can give no chattels but subject to the payment of debts. All his chattels are immediately liable to his creditors. The chattels do not pass by his gift to the legatee; but they go *first* to the executor, [102] and the law has prescribed their liability, and his liability by reason thereof, to the creditors; and the liability of

legatees, if the executor delivers them over without satisfying or providing for the satisfaction of their demands. There is no ground from these words to presume a specific charge upon such chattels. But there is reason for holding that, as the testator desired that *they* should be so applied in preference to *other* parts of his personal property, the legatees of the latter, as between them and the legatees of the former, have a right to exoneration from the debts of the deceased.

The contending parties disagree whether the interest which Benjamin J. Spruill acquired in the chattels so bequeathed to his wife, was a legal interest. The *cestui que trusts* aver that the executor assented to the legacies, whereby the chattels bequeathed to Spruill's wife became her property in law, and upon the marriage became his absolutely; but the creditors allege, that they do not believe this, because the period for receiving the property had not then arrived. If by the period referred to they mean the time fixed for a division, they assign an unsatisfactory reason for that belief. The legatees were as competent to take jointly as severally, and the bequests are made to them, and not to the executor in trust for them. From a joint possession, an assent to a joint bequest is as presumable, as from a several possession that to a several legacy. The division was not to precede their possession—of course not to precede the assent to their legacy. If the question of lien depended on the fact whether there had been an assent or not, an inquiry, or an issue in regard to that matter should have been directed before pronouncing for such lien; but we think the question of lien is not affected by it. The plaintiff must account for the proceeds of the sales in his hands to those for whom he is express trustee, unless it is shown that they belong to others, and no other claim is set up to them here but as being liable, in his hands, to the general creditors of the deceased. This claim we think unfounded. If in truth the things sold be yet in law the assets of John Ross's estate, the decree in this cause cannot prevent the surviving executor, or any administrator *de bonis non*, with the will annexed who may be hereafter appointed, from asserting his right to the possession thereof;
[103] or be in the way of any creditor endeavoring to charge the proper representative of that estate with the value

thereof, or otherwise subjecting them to the satisfaction of his demand, as the assets of that estate.

It is the opinion of this Court, that so much of the interlocutory decree as is appealed from is erroneous, and ought to be reversed; and it is ordered that the same be certified to the Court below.

PER CURIAM. Decree reversed.

NOTE.—Upon the subject of charges for the payment of debts, see *Graham* v. *Little*, 5 Ired. Eq. Rep. 407; *Powell* v. *Powell*, 6 Ired. Eq. Rep. 50, and *Kirkpatrick* v. *Rogers*, 7 Ired. Eq. Rep. 44.

HANNAH GEE *v.* HENRY GEE and PEYTON R. TUNSTALL.

A marriage settlement which directs the trustee, in the event of the wife dying without issue of the marriage before her husband, to transfer to him all her property excepting her land and slaves, and to convey them as she should appoint; in the event of the wife's surviving the husband, there being no issue of the marriage, *held* upon the recital and other parts of it, to create a trust of the land and slaves for her sole and separate use.

Clear proof of fraud or mistake is necessary to reform a marriage settlement, and in the absence of it the deed is held to be conclusive.

Slaves in the hands of an administrator, to a share of which a *feme sole* is entitled, it seems pass under the description, in a marriage settlement, of all the slaves of which she was possessed.

Upon an account of the separate estate of a married woman between her and her husband's administrator, the latter is not entitled to credit for debts of the former paid by his intestate during the coverture.

Where a tenant for life demises the premises, and dies before the rent is due, his administrator is not entitled to any part of it.

The main purpose of this bill was to reform a marriage settlement entered into between the plaintiff and her deceased husband James Gee. This settlement was executed on the 24th of February 1824, between the said James Gee of the first part, the plaintiff, then Hannah Norfleet, widow and relict of Marmaduke Norfleet, of the second part, and the defendant Peyton R. Tunstall of the third part. It recited that a marriage was in contemplation between the parties of the first and second part: that the plaintiff was seized and possessed of a considerable estate, *consisting* of lands, slaves, stocks of different kinds, crops, household furniture and plantation imple-

ments: that it had been agreed that the said James, after the said marriage, should receive and enjoy during the lives of them, the said James and his intended wife, the interest and occupation of the said real and personal estate, and that the same and the interest and profits thereof, from and after the decease of such of them, the said James and Hannah, as should first happen to die, should be had and enjoyed by the [104] said Hannah if she should survive him, and after her death by any issue which might be of the intended marriage, and that the land and slaves, and the profits thereof, after the death of the said James and Hannah, or whichever of them should first happen to die, in case there should be no issue of the intended marriage, should be at the sole disposal of the said Hannah, notwithstanding her coverture; and then proceeded to convey in proper mode and by apt terms unto the said Peyton R. Tunstall, all the said lands, slaves, stocks of different kinds, crops, household furniture and plantation implements, upon trust after marriage, to permit the said James, during the joint lives of himself and his intended wife, to take and enjoy the interest and profits of the property thereby assigned, for his own use and benefit, and from and after the decease of such of them, the said James and Hannah, as should first die, in trust, if there should be issue of the said marriage, to permit the said Hannah, if she survive the said James, to receive and enjoy all the interest and profits of the said assigned property during her natural life, and upon the death of the said Hannah, to transfer all the said property to such issue; but in case the said Hannah should die before the said James, leaving no issue of the intended marriage, upon trust to transfer to the said James all the property thereby assigned except the land and slaves, and to transfer the said land and slaves unto such person as the said Hannah should by instrument in writing in the nature of a deed or will, limit and appoint, to the intent that the said lands and slaves might not be at the disposal, or subject to the control or debts, of the said James; and in default of issue of the intended marriage, and of such limitation or appointment in relation to the said lands and slaves, to the heirs at law of the said Hannah. The contemplated marriage took place on the day of the execution of the

settlement, and in April 1834, the said James Gee died intestate, and administration of his effects was duly granted unto the defendant Henry Gee. The widow, on the 14th of March 1835, filed this bill against Henry Gee and Peyton R. Tunstall the trustee. The bill charged that there was an error in the marriage settlement in this, that by the agreement made between her and her late husband previous to their marriage, all the property of every description then belong- [105] ing to her was to be conveyed to the said Tunstall upon the trusts declared in the said settlement; that her said late husband undertook to have the settlement prepared, and caused it to be drafted by a legal gentleman in the State of Virginia, where he, the said James, then resided; that it was presented to, and executed by her under the representation that it conformed to the said agreement, but that either through the fraud or negligence of her husband, or mistake of the draftsman, the settlement omitted to convey to the trustee, and secure to the trusts agreed upon, the money, stock and furniture then belonging to the plaintiff, and the debts due to her, and securities for money then in her possession. The bill then charged, that after the marriage her husband received from the administrator of the plaintiff's first husband the sum of $12,330 62, in part payment of her distributive share of such intestate's estate; that he further received, under an order made on a petition for division of the slaves that were of said intestate's estate, a large number of negroes as the plaintiff's share: that afterwards, upon an arbitrament made of sundry matters of dispute between the persons entitled to distribution of said intestate's estate, it was awarded that her said husband had received more than the just amount of the plaintiff's share therein by the sum of $2910, and that in payment of said excess he should convey to David Clark, the husband of one of the next kin of said intestate, eleven of the negroes so received by him as the plaintiff's distributive share; and that her husband afterwards re-purchased from said Clark, one of the said negroes by the name of Jim: that he afterwards disposed of the said Jim, and then purchased two negroes, Charles and Doll, with the money of the plaintiff paid unto him by the administrator of her former husband, intending that they should be substituted in lieu

of Jim, and that at a sale made by the administrator of her first husband of the perishable estate of his intestate, her late husband purchased stock and furniture, to a seventh part whereof she was entitled. The bill prayed that the marriage settlement might be reformed and a trust declared for her in regard to all the property of whatever nature or description
[106] which came to her late husband upon his intermarriage, and the plaintiff declared a creditor of her husband as to the said sum of $12,330 62, and if the said settlement should not be reformed, that she might be declared entitled to compensation for the negroes surrendered to David Clark, and their issue, to the negroes purchased by her late husband with her money, and to compensation for her one-seventh part of the stock and furniture purchased by her late husband at the administrator's sale.

The defendant, Henry Gee, answered the bill, admitted that he was the administrator of the late James Gee, and referred for the state of the assets which had come to his hands to the inventory and account of sales which he had returned to Court. The answer denied that there was any fraud or mistake in the drafting or execution of the marriage settlement, and insisted that it was perfectly understood before the marriage, and part of the agreement between his intestate and the plaintiff, that he should become entitled as husband to all the moneys due and owing to the plaintiff, which the intestate might receive, or reduce into his possession. With respect to the slaves which the bill *charged* that the defendant's intestate conveyed to David Clark, the defendant denied that the plaintiff *has* any just claim for compensation. He stated that Marmaduke Norfleet, the first husband of the plaintiff, left him surviving his said widow and five children, and also left a will, and Peyton R. Tunstall was duly appointed his administrator with the will annexed: that the slaves belonging to the estate remained undivided, some of them being hired out by the administrator, and the others working on the plantation of their late master, under the superintendence of the administrator, and that the said administrator kept possession of all the other personal property of the said Norfleet, until after the intermarriage of the defendant's intestate with the plaintiff: that after the inter-

marriage a division was made of the slaves which were of the said Norfleet's estate into five equal shares, of which one was allotted to the defendant's intestate in right of his wife, amounting according to valuation to the sum of $7,320 20; that after the marriage a sale was made by the administrator [107] of the perishable property of his testator, at which sale the defendant's intestate purchased a large amount of stock of various kinds, plantation utensils, furniture, &c., and that he never got into possession or enjoyed any stock, plantation utensils, or furniture whatever, which were her property: that several suits having been instituted between the persons interested in the said Norfleet's estate, the entire settlement of the estate was referred to arbitration: that the arbitrators awarded that the defendant's intestate, in right of his wife, was entitled to receive but one seventh instead of one-fifth of the slaves, and had received an excess on account thereof; that the said intestate had received from the administrator of Marmaduke Norfleet more than his wife's share of the value of the perishable estate of the said Marmaduke, and was indebted to the estate in two sums, because of the use of the slaves, and of the money of the estate by his wife before his marriage, making altogether a debt against him of $4117 43; and thereupon they further awarded that the intestate should pay to Weldon Edwards, in right of his wife Lucy, $1207 29, and deliver over to David Clark eleven of the slaves he had received under the former erroneous allotments, amounting in value to $2910. The defendant insisted, that as to so much of the value of the said slaves thus transferred to David Clark, as corrected the error in the former allotment, the plaintiff could have no claim against her husband's estate, and that as to the residue, he has a just counter claim by reason of *her* debts contracted before the marriage, so paid off by these negroes. He also insisted that the plaintiff consented that these debts should thus be paid off, and therefore could not on that account claim compensation.

The defendant further stated, that a crop was partially planted by his intestate, on the lands of the plaintiff, which was subsequently made by the labor of the slaves of the plaintiff and of his intestate, and had been wholly received by the plaintiff: that the plaintiff also reaped a quantity of wheat

which had been previously sown by the intestate, and had applied to her own use a quantity of bacon left by the intestate: also that before his death he had leased out parcels of the land of the plaintiff upon shares of the crop, and that these [108] rents had been received by her since his death; and the defendant claimed to be credited in account therefor. He also insisted that he was entitled to credit for the sum of $750, which his intestate accounted for to the estate of Marmaduke Norfleet, because of a slave of that estate sold by his said wife, before their intermarriage. The answer further alleged that the intestate, in right of his wife, caveated the probate in Virginia of the will of one William Hill, her relation: that by the said will all the property of the testator was given away from the plaintiff: that the intestate succeeded in effecting a compromise, by which was secured to the intestate the sum of $1500 or thereabouts: that about three months before the death of his intestate, when he was about to receive the sum so secured, he was restrained from doing so by an injunction obtained at the instance of the plaintiff upon an allegation of facts wholly groundless; and that in about a week after his death, the plaintiff proceeded to Virginia, and upon giving an indemnifying bond, procured and received the said money.

The defendant admitted that his intestate purchased the negro slave Jim back from David Clark, but declared that the purchase was effected with the money of the intestate, and that Charles and Doll were not purchased as substitutes for Jim, but were bought before he purchased Jim, and bought with his proper money.

The answer was replied to generally, and proofs were taken on both sides, the substance of which will be found stated in the opinion of the Court.

Badger and *Devereux*, for the plaintiff.

Iredell and *Moore*, for the defendant.

Gaston, Judge, after stating the case as above, proceeded as follows: On the subject of the alleged error in the marriage settlement, the plaintiff has examined but one witness, John H. Edwards. His testimony has been taken twice; the Court

has attentively considered both his depositions, and is at a loss to pronounce satisfactorily what is proved by them further than an impression of the witness, founded on conversations with the parties, that the property of Mrs. Norfleet was to be so settled as to secure the use of it to her intended hus- [109] band during the marriage. This is very weak testimony to show that the settlement was intended to embrace *all* the property to which Mrs. Norfleet had claim, as well as that whereof she was possessed. The settlement itself, unless there be clear proof to impeach it for fraud or mistake, is conclusive of the agreement of the parties. There would be no security for property if such solemn instruments could be set aside by vague testimony. Besides, any inference from this "understanding" of the plaintiff's witness is repelled by the testimony of Ann S. Wooten, a witness on the part of the defendant. She, like the witness John H. Edwards, was a subscribing witness to the marriage settlement. She resided with the plaintiff at the time of her intermarriage with the defendant's intestate, and deposes that some days before the said marriage was solemnized, the plaintiff, speaking of the settlement, informed her that it was a marriage contract made to please her children, which she did not expect to have proved, and "that there was nothing said in the deed concerning the money that was coming to her, and the profits of the farm, and he, James Gee, would get *it* in spite of her children." The Court has no hesitation in declaring that the plaintiff has not made out a case for reforming the deed.

The construction of the deed is not free from difficulty. The bill charges that the property of the plaintiff, therein described as "consisting of lands, slaves, stocks of different kinds, crops, household furniture and farming implements," was conveyed upon trust for the use of the husband during their joint lives, with remainder to the issue of the marriage, if any, and in default of issue, then in trust for the plaintiff, or such person as she should appoint. On examining the deed, however, it will be found that after the trust declared for the husband, during the joint lives of himself and wife, it proceeds to declare the trusts in the event of one dying and *there then being issue* of the marriage. In *this* event it provides, that the said Hannah,

if she survive, shall enjoy the profits of the property during her life, and the property itself shall be transferred to the issue.

The deed then proceeds to declare the trusts in the event [110] of the plaintiff *dying before her husband*, and leaving no issue, and in that event requires of the trustee to transfer to her husband all the settled property, except the land and slaves, and to transfer those unto such person or persons as she shall by writing, in nature of deed or will, appoint. Neither of the events thus specifically provided for has happened, and unless we can collect from the instrument some other indications of a trust, it would follow that no trust has been declared suited to the event which has happened. In such a case equity would follow the law, and hold the husband entitled to all the personal property reduced into possession during the coverture. We think, however, that we can collect from the instrument indications of a trust applicable to the event which has occurred, although it must be confessed that they are not explicit, and arise upon language very inartificial. The deed, after declaring the last mentioned trusts in regard to the land and slaves, proceeds thus, "to the intent that the *said lands and slaves* may not be at the disposal or subject to the control or debts of the said James Gee, her intended husband—and in default of such issue of the intended marriage, and of such limitation or appointment in relation to the said lands and slaves, to the heirs at law of the said Hannah Norfleet." When we consider that these slaves were, previously to the settlement, her property, and see that any dominion over *them* by her intended husband, except as to the profits thereof during the marriage, is so sedulously guarded against, and that the ulterior estate in them is limited to *her* appointees, and for want of appointment, to "*her* heirs," and when we further advert to the recital in the deed, that it had been agreed "that the *land and slaves*, and the profits thereof, after the death of the said Hannah and James, or of *whichever* of them should *first* happen to die, in case there *should be no issue* of the intended marriage, should be at the sole *disposal* of the said Hannah, notwithstanding her coverture;" we feel ourselves justified in declaring, that upon the whole instrument an intent appears that the trustee should hold the said lands and slaves,

after the death of the husband, without issue of the marriage, in trust for the widow. See *Sugg* v. *Tyson*, 2 Hawks, 472.

We do not feel ourselves authorized to infer such a trust in regard to any other property conveyed by the [111] deed than "lands and slaves." The specification of these in the parts of the deed on which we have relied for inferring this trust, would seem to exclude the other property. A difficulty might have been raised on the part of the defendant, which is waived by the answer, whether the widow's share of the negroes of her deceased husband were conveyed by the deed. In law the property in these slaves, as in all the other chattels of the deceased, was in the administrator. She could not with legal propriety be said to be "possessed" of any of them, but had a right only to claim from the administrator her one-seventh part of the net surplus of the estate in his hands, after payment of debts. But as it appears from the case that she had no other slaves, or personal property, except her interest in the estate of her husband, a construction of the deed which would exclude this interest wholly from the operation of it, would be to render the deed a nullity. The distinction taken by the defendant between her share in the slaves and in the other personal property of her deceased husband, seems so reasonable, that even if we doubted of its correctness, we should on his *admission* adopt it. Slaves, though personal chattels, are regarded in our law as imperishable goods, which it is the duty of the executor or administrator to keep, and divide in kind, between the legatees and next of kin. An unnecessary sale of slaves would render him liable to them for a *devastavit*. But with regard to the other personal chattels which deteriorate by time, the case is otherwise. These, except when they have been specifically bequeathed, he is directed to sell, and after payment of debts he accounts for their value to his *cestui que trusts*. Without much *violence* of language Mrs. Norfleet might have been considered as possessed of an undivided part of the slaves, as the whole of them were kept together for the purposes of a division in kind, when she could not with propriety be said to have possession of any of the other chattels of her deceased husband, directed by law to be sold, kept by his administrator to be sold, and afterwards actually sold by him

in pursuance of his duty. If, therefore, the trust inferred for the plaintiff applied to *all* the property conveyed by the deed, we think it would not sustain her claim against the ad-
[112] ministrator for the money part of her distributive share, because such distributive share (except as to the negroes) did not pass by the deed.

The award referred to in the bill and answer, and all the proceedings upon it, have been exhibited. That award establishes that James Gee and wife were entitled to one-seventh part of the personal estate of the late Marmaduke Norfleet, amounting to $15,629 87: that of this they had already received from the administrator the sum of $12,536 16, leaving a balance due them of $3093 71, and then awards that they shall take certain slaves of the estate, thereby set apart to them, and valued at the sum of $4301, and pay the excess of the value of these slaves above the balance so found due, $1207 29, to Weldon N. Edwards. The award found the whole value of the slaves to be divided, $36,601, of which the one-seventh part was $5228 71. As we have declared that, upon the settlement, and in the event that has occurred, a trust did arise for the plaintiff in the undivided share which she was entitled to *of the slaves* of her first husband's estate, we hold that she should have compensation from the estate of the intestate for the deficiency in the share of the slaves occasioned by reason of advances from the administrator, exceeding her distributive share in those parts of the personal estate which in the event that occurred, became the absolute property of defendant's intestate. This difference of value, $927 72, is to be regarded as a debt to her upon the death of her late husband, and not before, since during the marriage he was entitled to all the interest and profits of the settled estate.

We see no other well founded claim of the plaintiff to compensation. The division of the slaves made before the awards, was altogether erroneous, and was treated by the referees as null. For convenience indeed they set apart to the persons respectively entitled to distribution, many of the same slaves as had been before allotted to them. But the partition made in the award is a partition of *all* the slaves. The former is treated as having conferred no rights.

There is no evidence to support the allegations that the slave Jim was bought with her money, or that Charles and Doll were either purchased with her money, or as substitutes for Jim. And it follows from what has been already [113] said, that she has no claim to compensation, because of the furniture and stock purchased by the intestate.

On taking the account which will become necessary by reason of the compensation herein declared in favor of the plaintiff, the defendant may set-off the amount by any just claims which the intestate, or himself as the representative of the intestate, has against the plaintiff. On some of those which have been brought forward in the answer, the Court has formed an opinion, and will declare it.

As the Court has put a construction upon the settlement which gives to the intestates in the event that has happened, an absolute interest in all the distributive share of his late wife, in her former husband's personal estate, except the negroes, and has declared a trust for her in these negroes so that the same should not be affected by his dominion, control or engagements; and has held the intestate accountable only for the diminution of that trust fund; it follows that the debts of the wife, which the intestate paid off, do not constitute a credit for him upon the account for compensation. He acquired a large personal estate *jure mariti*, and he took it subject to the obligations which the law imposed upon him as husband. There is no evidence that the wife made a gift to him of the slaves, or of the balance due her, because of the slaves.

The defendant's intestate is entitled to a credit for the value of the emblements received by her, or for the hire of the negroes of the defendant's intestate after his death, and for the value of any of his other personal property then converted to her use after.

The defendant is not entitled to demand from the plaintiff any part of the rents of the land which became due after the death of the intestate. Equity follows the law, and where a tenant for life leases and dies before rent-day, it makes no apportionment of the rent. *Jenner* v. *Morgan*, 1 P. Wms. 392; *Hay* v. *Palmer*, 3 P. Wms. 501.

The only remaining credit claimed is because of the sum of

money stated in the answer to have been secured to the intestate, on the compromise of his caveat in Virginia, and received by the plaintiff after his death, under the peculiar circumstances alleged. The facts in relation to this transaction [114] are too imperfectly disclosed to enable us to pronounce upon the validity of this claim. The defendant is at liberty to bring it forward, and shew it in full before the commissioner, should he be advised to do so. If the sum of money was, as the answer avers, secured to be paid *to the intestate*, we do not see what is to prevent the defendant from re-claiming it from the person who has wrongfully paid it to the plaintiff. Perhaps, however, if the case be so, the defendant may treat it as so much money received by her to his use, as administrator of the intestate. If the money was not secured to be paid to the intestate, but to him and his wife, we should think that the interest in it never vested in the intestate. The Court, however, makes no declaration on this matter, but reserves it for consideration upon the coming up of the report.

An account is directed to be taken of what is due to plaintiff for compensation, because of the impaired value of the trust fund at the death of the intestate, and the commissioner is to allow as credits on that account the fair amount of the claims on the part of the defendant, which the Court has recognized as correct in principle, and such others as the defendant may establish, by evidence to the satisfaction of the commissioner, to be fair counter-demands against the demand of the plaintiff.

If the parties do not agree as to the assets of the intestate, and any thing is found by the commissioner to be due to the plaintiff upon the above account, he must proceed to take also an account of those assets, and of the defendant's administration of them.

In conclusion I would remark, that the Court regrets that a case like the present, involving questions worthy of discussion, has been submitted without argument, and express the readiness with which it would listen to an application for a re-hearing from either party.

Per Curiam. Decree accordingly.

NOTE.—Upon the construction of marriage settlements, see the cases of *Steel*

v. *Steel*, 1 Ired. Eq. Rep. 452; *Gause* v. *Hale*, 2 Ired. Eq. Rep. 241; *Hooks* v. *Lee*, 7 Ired. Eq. Rep. 83; *Jones* v. *Hurst*, Ibid. 134; *Freeman* v. *Moses*, 2 Jones' Eq. 22; *Boyd* v. *Small*, 3 Jones' Eq. 39. Marriage *articles* are not considered as settlements, and as such to be taken as fully and duly expressing the well considered and final family arrangements, by persons about to enter into the married state. They are regarded in a court of equity, as but notes of the heads of an agreement, in its nature executory, and the trusts created by it are to be favorably moulded by the court, so as to effectuate the intention of the parties in reference to the provisions for themselves, for the issue of the marriage, and such other persons as are apparently within the contemplation of the parties. *Hooks* v. *Lee*, 8 Ired. Eq. Rep. 157.

EQUITY CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NORTH CAROLINA.

DECEMBER TERM, 1838.

THE BUNCOMBE TURNPIKE COMPANY *v.* JAMES ALLEN.

The circumstance that a turnpike company were induced to lessen their rate of tolls in consequence of the encroachments and illegal acts of the defendant, might perhaps be taken into consideration in an action on the case at law, but will furnish no reason for an account in equity for receiving or abstracting the plaintiffs' tolls.

The bill stated that the plaintiffs were incorporated by the legislature into a company to lay out a turnpike road from the Saluda Gap, through the county of Buncombe, by Asheville and the Warm Springs, to the Tennessee line, with power to take tolls for the travel on said road, not exceeding a table of rates set forth in the bill: that in laying out the road, they were necessarily compelled, from the mountainous situation of the country, to run a few miles of the line of their road upon an old road, that had heretofore composed part of a turnpike granted by the legislature to two men by the names of Hoodenpile and Barnard: that the privileges once granted to the proprietors of the latter road had been forfeited, as well by *non user* as the omitting to comply with the conditions and stipulations contained in the legislative grant. The bill then stated that the defendant, pretending to be the assignee of the interest of Barnard in the old road, had also recently opened a new road, beginning on the Tennessee line seventeen miles north of the western termination of the old Hoodenpile [116] and Barnard road, and joining that old road west of that

portion of the line where the plaintiffs' run into, and upon the said old road: that the defendant obtained from the legislature the privilege of collecting tolls on the travel over his new road, with a view to enable him to keep the same in repair: that the defendant, instead of placing his toll-gate across some part of his new road, so as to receive toll from those only who traveled over it, as in law he had a right to do, fixed his toll-gate across the plaintiffs' road at that small portion of their line which run upon the old Hoodenpile and Barnard road. The bill then charged, that by this conduct of the defendant, all the travellers going east and west on the plaintiffs' road were compelled to pay, in addition to the tolls due them, a second set of tolls to the defendant, although they did not travel more than two or three miles on the old line of road formerly Hoodenpile and Barnard's; which small portion of road, the defendant pretended was his, as one of the assignees of Hoodenpile and Barnard, notwithstanding it was kept up by the plaintiffs as part of their long line of road; and that the defendant had received large sums of money from travellers on the road which he had no right to take. The bill then stated further, that the defendant not keeping his new road in repair (as he was bound as a condition of receiving tolls on that road to do,) certain commissioners, appointed by authority of law, removed the defendant's toll-gate; but that the defendant had again set up his gate, in contempt of the law, and still continued to exact tolls of all the travellers passing over the plaintiffs' road: that the plaintiffs, in consequence of the defendant's illegal acts, and the fear of the loss of travelling over their road, had been compelled to reduce their rates of toll one-fifth less than they were authorized by their charter to take, and that their profits had been diminished at least twenty per cent. The bill prayed for an injunction to restrain the defendant from keeping up his gate on the plaintiffs' road, and also prayed an account of the tolls received by the defendant. The defendant answered and set up title as one of the assignees of the unexpired term of the grant of the turnpike road to Hoodenpile and Barnard.

[117] He said that the plaintiffs run their road into his, against his will and consent; that he had received no more tolls than he was entitled by law to take for travel over

his road; that the commissioners put down his gate, upon a view illegally made, when he was not present and had no notice, and that he set up his gate again by the permission of one of the commissioners.

The bill was filed in February 1831, and an injunction was granted, with leave to the defendant, notwithstanding, to bring an action at law against the plaintiffs. When the answer came in, the cause was set for hearing upon the bill and answer, and on the hearing in October 1833, the Court dismissed the bill, and the plaintiffs appealed.

The *Attorney General*, for the plaintiffs.

No counsel appeared in this Court for the defendant.

Daniel, Judge, after stating the case as above, proceeded as follows: In looking into the several acts of Assembly, under which the defendant claims the grant of turnpike privileges, it seems that the several terms of years therein mentioned, expired at the close of the year 1831. The defendant having now no pretence to keep up a toll-gate across any of the roads, it is unnecessary for us to make any decision on this part of the case, as it is admitted that the gates put up by the defendant have not been kept up since the filing of this bill.

Secondly, we do not see any ground upon which the plaintiffs have a right to ask an account against the defendant. The defendant may have improperly exacted tolls from the public, but there is nothing in the bill which shows that he has ever received or abstracted one cent of tolls which by law and right belonged to the plaintiffs. The plaintiffs have always received their full amount of tolls from travellers according to the rates which they had established. The circumstance that the company were induced to lower their rate of tolls in consequence of the alleged encroachments, and illegal acts of the defendant, might perhaps have been taken into consideration in an action on the case at law; but it is no reason for an account in this Court for receiving or abstracting the plaintiffs' tolls. [118] The decree of his Honor is therefore affirmed with costs in this Court.

Per Curiam. Decree affirmed.

NOTE.—That a court of equity will not take jurisdiction of a case where the damages are uncertain and are the proper subject of inquiry before a jury, see *Anderson* v. *Arrington*, 1 Jones' Eq. 215.

JORDAN NELSON *v.* JAMES WILLIAMS et al.

A surety is entitled to the benefit of every additional or collateral security which the creditor gets into his hands for the debt for which the surety is bound. As soon as such security is created, and by whatever means, the surety's interest in it arises; and the creditor cannot himself, nor by collusion with the debtor, do any act to impair the security, or destroy the surety's interest in it. Therefore where a judgment was obtained against a principal and surety, and an execution was, at the instance of the surety, levied upon land of the principal sufficient to discharge the debt, *it was held*, that the creditor could not, to the injury of the surety, discharge the levy so as to let in another debt of his own, much less could he assign the judgment to another person to enable him, by discharging the levy, to save a debt to the prejudice of the surety.

In favor of sureties, a security stands upon the same footing with a payment. If the principal direct a fund to be applied to the payment of a debt for which the surety is bound, the creditor cannot, for his own advantage, change the application to another debt. As respects the surety the debt is paid.

So, if the debtor gave the creditor a mortgage as a further security for a debt, for which a surety is before bound, the creditor cannot for any purpose of ease to the debtor, or of advantage to any third person or to himself, surrender the mortgage, or divert the mortgaged property to another purpose. The creditor was not bound to be active in obtaining the mortgage, but once accepted, he must keep it on foot for the benefit of the surety as well as himself.

It is the same with securities not provided by the debtor, or obtained against him *in invito*. If the creditor take judgment against the principal and release it, the surety is of course discharged.

The statement of the bill was, that one Britt, and the plaintiff as his surety, gave to Brinkley a bond, on which judgment was rendered in November 1837, for $109 50, against both the obligors. Britt then owned a tract of land, unencumbered and of value sufficient to satisfy the debt; but his circumstances were becoming doubtful. It was agreed therefore, between Brinkley and the plaintiff, that a *fieri facias* should be sued out and levied on the land, which was accordingly done, and a sale advertised by the sheriff. The bill then stated, that subsequently thereto, the defendant Williams, being a creditor of Britt, procured, as a security for his debt, a deed of trust for the same land; and then he purchased the judgment from

Brinkley and took an assignment to himself, and directed the sheriff not to sell under the execution. Upon the return of it, he sued out a *ca. sa.* on which the plaintiff had been taken in execution; and also caused the trustee to sell the land under the deed of trust and become the purchaser. The bill charged, that Williams knew the plaintiff to be only a surety; and that Britt had been rendered wholly insolvent by the sale under the deed, and had absconded. The prayer was to be relieved from the judgment, and for an injunction.

The defendant Williams alone put in an answer, on [119] which he moved for a dissolution of the injunction which had been granted on the bill. The answer stated that Britt was indebted to this defendant, and becoming insolvent or likely to be so, he took the deed of trust to secure the payment of his debt; and proceeded, "that for the purpose of making his deed of trust good and having the control of the judgment debt, he paid Brinkley the debt and took an assignment of it; and that having thus got the control of both the execution and the deed of trust, the defendant, deeming that he had a right to use them as best comported with his own interest and would most effectually secure him from loss, abandoned the levy of the execution, and had the sale made under the deed of trust." The answer admitted that Britt was insolvent and had left the State; and that the defendant had understood that the complainant was the surety for Britt, but stated that he did not know it.

It pleased his Honor to allow the motion of the defendant, and dissolve the injunction with costs, from which an appeal was granted to the plaintiff.

The Attorney General, for the plaintiff.

Iredell, for the defendant.

Ruffin, Chief Justice, having stated the case as above, proceeded as follows: This Court is unable to take the same view of the case which his Honor did. The bill appears to us to present every fact material to the equity asked by the plaintiff; and the allegations of the bill are either admitted or not denied; which, in this stage of the proceeding, is all one. It must be taken then, that the execution was levied at the instance of

the surety on the property of the principal, and would have been satisfied but for the admitted acts of the defendants; and that now it cannot be satisfied out of the effects of the principal, who is insolvent. The question is, whether those acts of the defendants are justifiable, or are so injurious to the plaintiff as to discharge him.

The decree does not express the principle on which it is founded. We suppose it to have gone on the ground taken in the answer, that the defendant Williams, being the owner of the two debts, had the right so to dispose of the respective securities as to protect himself in the result from any loss.

[120] This Court does not accede to that doctrine, so far as the creditor endeavors to save himself from the loss of one debt by throwing on the surety the loss of the other. The surety is entitled to the benefit of every additional or collateral security which the creditor gets into his hands for the debt for which the surety is bound. As soon as such a security is created, and by whatever means, the surety's interest in it arises; and the creditor cannot himself, nor by any collusion with the debtor, do any act to impair the security or destroy the surety's interest. He is bound not to do it. A security stands upon the same footing with a payment. If the principal direct the fund to be applied to the payment of a debt for which the surety is bound, the creditor cannot for his own advantage change the application to another debt. As respects the surety, the debt is paid. So if the debtor give the creditor a mortgage, as a further security for a debt for which a surety is before bound, the creditor cannot for any purpose of ease to the debtor or of advantage to any third person, or to himself, surrender the mortgage or direct the mortgaged property to another purpose. The creditor was not bound to be active in obtaining the mortgage; but once accepted, he must keep it on foot for the benefit of the surety as well as himself. Besides his own interest, he is a trustee for all concerned. Moreover, in the execution of it the debtor intended not only the surety of the creditor, but the indemnity of the surety; and therefore the surety must be consulted before one or both of the other parties can dispose of the mortgage. It is the same with securities not provided by the debtor or obtained against him, *in invito*. If the

creditor take judgment against the principal and release it, the surety is of course discharged. So it was held by us in *Cooper and Arrington* v. *Wilcox*, ante, page 90, that a *fieri facias* levied was a substantive additional security to the extent of all the property seized, and that to discharge it, for favor to the principal, exonerated the surety. The purpose of applying the fund to the satisfaction of another debt to the same creditor, will not authorize the surrender of the mortgage or the discharge of the levy more than favor to the debtor would. For the creditor is, to the extent of the securities held by [121] him, a trustee for the surety, and therefore cannot upon any pretence deal to *his* prejudice without *his* consent. To the extent the property would satisfy the debt, the surety is, as *cestui que trust* of the creditor, to be considered in this Court the owner of it. To the same extent the application made in this case is, in the view of equity, taking one man's property to pay the debt of another.

But the case is yet stronger than if Brinkley had been the creditor in both instances. The assignment does not give Williams the legal title to the judgment, but it transfers that and no more, which Brinkley could justly and equitably transfer. If we admit that Brinkley could have withdrawn the execution to let in another debt to himself—on the law of self-preservation—yet he ought not to do so in favor of another creditor who had no previous claim on his benevolence and no specific claim on the property. Brinkley's duty to the plaintiff was to allow the lien of the execution to be enforced by the sheriff, and not to transfer the debt for the very purpose of destroying that lien; and Williams ought not to have accepted what he knew Brinkley ought not to give.

In the opinion of the Court, the injunction should have been continued until the hearing; and if the plaintiff should establish the facts, that he was surety and that the land levied on was of greater value than the debt—both of which we nearly collect from the answers—he will be entitled to a decree discharging him altogether. The decree must therefore be reversed, with costs in this Court, and this opinion certified to the Court below.

PER CURIAM. Decree reversed.

NOTE.—See *Cooper* v. *Wilcox*, ante 90, and the cases referred to in the note thereto.

[122] ISHAM A. DUMAS *v.* ROBERT POWELL, Adm'r of SAUNDERS MEREDITH.

The owner of a single bill or bond for the payment of money destroyed by accident, may in equity recover the principal and interest due on it, upon tendering bond and security to the defendant to indemnify him against any liability that may afterwards arise concerning the said obligation.

When the answer of an administrator neither admits nor denies assets, there must be an inquiry and report as to the amount of assets in the defendant's hands, unless he waive such inquiry, before the plaintiff can have a decree.

The bill stated that Saunders Meredith, in consideration of goods, wares and merchandize, sold and delivered to him, executed to the plaintiff a single bill for the sum of $189 12, on the 25th of May 1827, and payable one day after date; and that the obligation had been since destroyed by accident. The prayer was for a discovery, and also for relief in the payment of the amount of the obligation with the interest accrued thereon. To his bill the plaintiff annexed an affidavit of the truth of the facts set forth in it.

The answer of the administrator of Meredith admitted nothing, and put the plaintiff upon full proof of his case; nor did it admit or deny assets to satisfy a decree if the plaintiff should obtain one. No counsel appeared for either party in this Court.

Daniel, Judge, after stating the case as above, proceeded as follows: We have examined the evidence, and the proofs are sufficient to satisfy us that the defendant's intestate did execute to the plaintiff the obligation mentioned in the bill, for the consideration therein stated, and for the sum of $189 12, payable one day after date, and dated the 25th of May 1827. There is no proof that the said obligation has ever been paid. The plaintiff has appended to his bill an affidavit that the debt is unpaid, and that the obligation has been destroyed by accident, and there is strong corroborating proof of the truth of this affidavit. We are of opinion that he is entitled to a decree for $189 12, principal money, and interest on the same, to

be computed from the 26th day of May 1827, on tendering to the defendant a bond with security to indemnify the estate of his intestate against any liability which may hereafter arise concerning the said supposed lost bond. But before the decree can be rendered, there must be an inquiry and [123] report as to the amount of assets in the hands of the defendant, unless he waive such inquiry.

PER CURIAM. Direct accordingly.

NOTE.—See *Allen* v. *The State Bank*, 1 Dev. & Bat. Eq. Rep. 3, and the cases referred to in the note thereto in the second edition.

WILLIAM H. PHILIPS *v.* JOSIAH TURNER et al.
JOSIAH TURNER *v.* WILLIAM H. PHILIPS.

Without a special agreement, partners are not entitled to charge each other for services in relation to the partnership business; except where a partner is appointed an agent for a *special purpose*, in which case he may be entitled to the usual compensation in relation to such agency.

The entries in the books of a firm are *prima facie* evidence as between the partners. Knowledge of them is presumed, and evidence is required to rebut such presumption.

An account of profit and loss is indispensable to the settlement of a partnership.

In the month of October 1825, William H. Philips and Josiah Turner formed a copartnership for carrying on mercantile business in the town of Hillsborough, under the firm and style of Turner & Philips. They afterwards changed the name of the firm to that of Josiah Turner & Co., and continued to carry on the joint concern until the month of January 1833. The copartnership was then dissolved, and Turner being regarded as the more responsible of the late partners, took upon himself the office of paying off the debts of the concern. Philips and Turner joined in an assignment of all the effects and credits of the copartnership, to Allen Parks, in trust, to collect the said debts, and to pay the proceeds thereof, as well as the proceeds of the said effects, to Turner, for the purpose of enabling him to pay off the debts of the firm; and Philips further conveyed to the said Parks certain property belonging or claimed to belong to the said Philips individually, in trust, to secure Turner from

loss. In August 1836, Philips filed his bill of complaint against Parks and Turner, alleging that the property of the copartnership had been more than sufficient to pay off its debts: that these had all been discharged accordingly: that a considerable amount of money was in the hands of the defendants or one of them, to a part whereof the said Philips was entitled; and praying to have the necessary accounts taken, and
[124] the defendants decreed to pay over to him what should thereupon be found due. The defendants severally answered this bill. The defendant Parks set forth an account of his management of the trust property, showing the amount received, the amount paid over to Turner, and the debts yet remaining to be collected. The defendant Turner set forth an account of the debts which he had paid, and of the moneys which he had received from the trustee, according to which account he had paid a large sum over the amount of his receipts, and exceeding any sum which could probably be realized from the trust funds. Turner then filed a cross-bill against Philips, alleging that, on a settlement of the partnership accounts, Philips would be found largely indebted to the firm and to him as copartner: that all the property assigned to Parks was not sufficient to discharge the debts of the copartnership, much less to pay unto him the balance justly due from Philips upon said partnership; and prayed that an account might be taken of their partnership, and that Philips might be decreed to pay what should ultimately be found due to him. Philips answered this cross-bill, and insisted that upon taking the account prayed for by Turner, it would be found that Turner would be largely indebted to him. An order was made directing the master to take an account of all the matters in controversy between the parties and report the same to the Court. The master made his report, to which exceptions were taken by Turner, and the cause was transmitted to this Court for hearing.

W. A. Graham, for Philips.

No counsel appeared for the other parties in this Court.

Gaston, Judge, having stated the case as above, proceeded as follows: The first exception is, for that the master hath al-

lowed to Philips the sum of $500 annually, for his personal services to the firm. The master states that there was no evidence before him of any special agreement between the partners that Philips should receive a compensation for the care and management of the joint property; but that this allowance appeared to him proper, inasmuch as the business of the firm was almost exclusively under the personal superintendence of Philips. We take the rule to be perfectly established, that without a special agreement, partners are not en- [125] titled to charge each other for such services. The only exception that we are aware of, if indeed it can be called an exception, is where a partner is appointed an agent for a *special purpose*, in which case he may be entitled as against the firm to the usual compensation in relation to the subject of such agency. It is not unusual for partnership associations to be formed upon the very basis that one is to contribute his credit and the other his personal services to the success of the undertaking. This exception is allowed.

The second exception is, for that the master hath credited Philips, in account with the firm, for $900 advanced by him as stock at the commencement of the copartnership, without any evidence of such advance except the statement in the partnership books, which is not shown to have been known unto Turner. This exception is disallowed. The entries in the books of a firm are *prima facie* evidence as between the partners. Knowledge of them is presumed, and evidence is required to rebut such presumption.

All the other exceptions relate to profits alleged to have been made by the concern. We can neither allow nor overrule them, for the master hath not returned any account of profit and loss. Such an account is indispensable to the settlement of the partnership. The report therefore must be recommitted for this purpose. Being thus re-committed, the commissioner will also carry on the account of the trustee so as to embrace any further collections and payments that may have been made since the account now rendered thereof, and will proceed to execute the decretal order in every respect in which the report now re-committed is imperfect.

The report is re-committed to Edmund B. Freeman, with

full power to examine witnesses, to command the production of books and papers, and to examine the parties on interrogatories. The parties also may take testimony to be used on this reference by commissions in the usual way.

PER CURIAM. Decree accordingly.

NOTE.—It is settled that a partner, without a stipulation to that effect, is not entitled to compensation beyond his share of the profits for any services in conducting the trade, or settling the business of the partnership. *Anderson* v. *Taylor*, 2 Ired. Eq. Rep. 420. If the partners stipulate that one of them shall receive a salary for managing the business, it must be paid out of the partnership effects. *Weaver* v. *Upton*, 7 Ired. Rep. 458.

As to what is necessary to be stated in an account made for the purpose of having a settlement of a partnership, see *McRae* v. *McKenzie*, post 232, and *Jones* v. *Jones*, 1 Ired. Eq. Rep. 332.

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[126] MAURICE SMITH et al. *v.* STEPHEN THOMAS et Uxor et al.

A motion to dissolve an injunction may be made notwithstanding exceptions have been filed to the answer; and the motion for the dissolution and the exceptions will come on to be argued before the court together, when the court will not disregard the exceptions, but will look into them, and if found not to be frivolous, will give them due effect in repelling the defendant's motion.

Upon a bill brought for an injunction and relief against a deed alleged to have been executed after marriage, but antedated, or if executed before marriage, to have been done in fraud of marital rights, allegations that the husband at the time of the marriage had a good estate, and that children were born of the marriage, are not material to the main points of inquiry, and an omission to answer them will not prevent the dissolution of an injunction on a motion made for that purpose.

When a plaintiff alleges that he has never seen an original deed against which he seeks relief, and prays that the same may be produced for his inspection, the defendant is not bound to make the deed part of his answer, or annex it to it. The plaintiff must, in such case, obtain an order from the court for the production of the deed, which order, if disobeyed, will put the defendant in contempt, and of consequence prevent him from making any motion in the cause.

If exceptions to an answer are well founded, they answer the motion for a dissolution of an injunction. But *per se* they ought not to have that effect.

Exceptions to an answer must be deemed well founded if the defendant submit to them; or, if upon a reference to the master, he report in favor of them, until the report be overruled by the court. But if the defendant do not submit, nor the plaintiff move for a reference of his own exceptions in time to get a report before the defendant has a right to move to dissolve an injunction, the defendant may make his motion notwithstanding the exceptions.

On the 14th of August 1822, the plaintiff Smith intermarried with Mrs. Hays, then a widow and the mother of the defendant, Mrs. Thomas, then her only child and an infant of about four years of age. Mrs. Hays was then in possession of a negro woman and two children, which she claimed under the will of her first husband; and Smith, the second husband, upon his marriage, took them into his possession and kept them until he sold the woman to Yancy, about two years afterwards. Mrs. Smith afterwards died, and her daughter having intermarried with Thomas, they instituted an action of detinue against Yancy for the negro woman and her issue born subsequent to the sale to Yancy.

The bill was brought for an injunction and relief by Smith and Yancy, against Thomas and wife, and against Mrs. Williams and Mrs. Winstead, and stated that the plaintiffs at law claimed the slaves under a deed, purporting to be a deed of gift made to Mrs. Thomas by her mother on the 1st day of August 1822, and to be attested by the other two defendants, who were the sisters of Mrs. Smith. The bill charged that the deed was written by Mrs. Williams, and contrived by her and Mrs. Winstead by conspiracy, to cheat Smith: that in fact it was either made after the marriage and antedated; [127] or that those two defendants induced his then intended wife, their sister, over whom they had great influence, to execute it secretly and in fraud of his marital rights. The bill stated that Mrs. Williams had the custody of the deed and carefully concealed its existence until after the sale to Yancy, when she proved its execution and procured its registration, and it charged and sought a discovery of many circumstances in detail in support of the general allegations first mentioned.

Among the statements of the bill were the following: First, that Smith, at the time of his marriage, had a good estate; and that two children were born of the marriage and were still living. Secondly, that Smith "had never seen the original deed, but prayed that the same might be produced for inspection in this Court."

The transactions which gave rise to the controversy all took place in Person and Caswell counties, where the persons then resided. But the defendants had since removed to Georgia;

and their answers were there taken separately under commissions. They set forth in detail all the circumstances of the writing, execution, delivery and custody of the deed, and the motives for executing it, and stated explicitly that the whole was communicated to Smith and fully assented to by him before his marriage.

But the answers omitted to confess or deny the allegations respecting Smith's estate and his children; and were not accompanied by the production of the deed of gift, and contained no offer to produce it. For those exceptions the plaintiff filed exceptions to the answers.

Notwithstanding the exceptions, a motion was made on the part of the defendants to dissolve the injunction; and his Honor, thinking all the charges of fraud fully answered and denied, allowed the motion. From that the plaintiffs were permitted to appeal.

W. A. Graham, for the plaintiffs.

J. T. Morehead, for the defendants.

Ruffin, Chief Justice, having stated the case as above, proceeded as follows: It is contended on the part of the
[128] plaintiffs, that unless the answers had been perfected in the points excepted to, or the exceptions had been overruled, the Court could not entertain a motion to dissolve the injunction. If exceptions are well founded, they certainly answer the motion to dissolve. But *per se* they ought not, we think, to have that effect. If merely taking exceptions, though frivolous, would fetter the defendants so tightly, we might expect them in every case on the circuit, and especially when the remote residence of the defendant put it out of his power to perfect the answer promptly. Exceptions must be deemed well founded if the defendant submit to them; or, if upon a reference to the master, he report in favor of them, until that report be overruled by the Court. But if the defendant do not submit, nor the plaintiff move for a reference of his own exceptions in time to get a report before the defendant has a right to move to dissolve, the defendant may make his motion notwithstanding the exceptions. From the constitution of our Courts, this

is unavoidable, as the means of preventing the plaintiff from taking frivolous exceptions for the purpose of staving off the motion to dissolve. Of necessity this brings on the exceptions, and the motion for a dissolution of the injunction, to be argued before the Court together; for the Court will not disregard the exceptions, but will look into them, and if found not to be frivolous, will give them due effect in repelling the defendant's motion. It would, on the other hand, be but a pretext to strangle justice, to allow the existence simply of a frivolous exception to stand in the way of hearing the parties upon their respective substantial allegations.

We agree also with his Honor in thinking that there is nothing in the exceptions here taken, to prevent the decision that was made. Touching the circumstances of the husband, and the issue of the marriage, the facts either way would be perfectly immaterial to the main points of inquiry, whether the deed was executed before or after the marriage, or whether, if before, it was in fraud of the marital rights.

As to the other matter, this is not the proper method of presenting the objection. The deed is not to be made part of the answer or annexed to it. No allegation in the bill calls for it, or ought to call for it, as annexed to the answer. If a paper material to the plaintiff be in the defendant's [129] possession, or if an inspection of a paper belonging to the defendant be essential to the plaintiff's case, there is an easy method, in a proper case, of compelling its production, by an order obtained for that purpose. If disobeyed, the defendant will be in contempt, and of consequence, could make no motion. But here the attempt is to tie up the defendants, because they have not voluntarily filed the deed, without even a motion for such an order.

As we think that, notwithstanding the omissions pointed out by the plaintiffs, the answers as they stand are directly, explicitly and fully responsive to all charges of the bill as to the fraud, or as to the circumstances of which a discovery is sought as evidence of the fraud, the decree must stand as pronounced by his Honor. Should the plaintiffs at law recover, the Court can protect the plaintiffs in this Court from danger of loss by the change of possession, by requiring security for the produc-

tion of the slaves to answer the decree in this cause, if a reasonable ground for such an order can then be laid.

The plaintiffs must pay the costs in this Court, and this opinion be certified by the clerk to the Court of Equity for Caswell.

PER CURIAM. Direct accordingly.

NOTE.—The practice upon a motion to dissolve an injunction, is fully discussed in the subsequent cases of *Edney* v. *Motz*, 5 Ired. Eq. Rep. 234; *Capehart* v. *Mhoon*, Busb. Eq. Rep. 30; *Lloyd* v. *Heath*, Ibid. 39, and *Wilson* v. *Hendricks*, 1 Jones' Eq. Rep. 295.

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[130] WILLIE BUNTING et al. *v.* JOHN RICKS et al.

Much less than actual or particular knowledge in detail is sufficient to convert a person into a trustee, who co-operates with a dishonest trustee in an act amounting to a breach of trust. If any thing appears calculated to excite attention or stimulate inquiry, the party is affected with knowledge of all that the inquiry would have disclosed. Hence one who assists an officer of a court in misapplying the proceeds of an ordinary negotiable note held by the officer in trust for others, will be affected with notice of the breach of trust, although he was ignorant of the character in which the officer held the note, if he knew that it was given for property sold by a commissioner under an order of the court.

The sureties of an insolvent clerk of a court, upon a breach of trust by their principal, will in equity be entitled to all the remedies and securities that were in the power of the *cestui que trusts*, or creditors, against one who co-operated in the breach of trust, and this even before they have paid to the *cestui que trusts* or creditors, the amount misapplied by their principal.

A counter demand in the nature of a set-off, cannot be allowed as such, unless it is mutual.

A claim set up as a counter demand cannot be allowed as a set-off, where there are no allegations upon which it can be seen that the plaintiff is legally responsible for that sum.

This cause was heard upon bill and answers. From the pleadings it appeared, that in a cause by petition in the County Court of Nash, between Zaney Lewis and others, there was an interlocutory decree, that a certain slave should be sold for the purposes of the suit, and Bolin Melton was appointed commissioner to make the sale on a credit of six months. In conformity with the decree, he made the sale on the 17th day

of December 1836, to John B. Bunn, for $1106; and took the note of the purchaser and one Cooper as surety, of that date, payable to himself or order. At the succeeding February term, Melton reported the sale, and delivered the note into Court, that is to say, into the hands of Arthur Whitfield, then the Clerk of the Court. By an order in the cause the sale was approved, and the Clerk directed, when the note should fall due, to collect the money, so as to have it subject to the further order of the Court. On the 10th or 12th of June 1837, Whitfield applied to the defendant Ricks, to discount the note for him; which the latter at first declined, upon the ground of the want of funds. Whitfield was much embarrassed and pressed for money, as was known to Ricks; who indeed suspected, as did other persons generally, that Whitfield was insolvent; and it so turned out within a few weeks afterwards. He [131] again urged Ricks to make the discount, and, as an inducement to him, proposed that about $500 of the proceeds should be applied to debts which Whitfield then owed Ricks. The answer of Ricks stated, upon this part of the case, that he, Ricks, knew the note was taken by Melton for the price of the slave sold by him as commissioner under the order of the Court, but he did not know that it had been returned to Court or that Whitfield held it as Clerk for collection; that Whitfield told him the fund was to be kept at interest during the life of Zaney Lewis for her benefit, and at her death the capital was to be divided among the other parties in that cause; and that he, Whitfield, had given to Melton satisfactory security to pay the interest annually, and at the death of Zaney Lewis, the principal sum, and thus had become entitled to this note for his own use. Ricks still declined taking the note without the endorsement of Melton, which the other assured him, he could readily obtain. On the 13th of June, Whitfield applied to Melton for his endorsement, representing that it was necessary to enable him, as ordered, to bring suit or receive the money; and for that reason, and without any other consideration, Melton made an endorsement to Whitfield, of that date. On the 17th of June, Whitfield renewed his application to Ricks, and repeating his declarations that he had taken this note from Melton, and for it had given his own bond with good security,

upon which he would have to pay only the interest half-yearly while Zaney Lewis lived, he showed to Ricks the note with Melton's endorsement on it; which was regarded by Ricks, as he says, as a confirmation of Whitfield's statements, and at all events, made Whitfield the legal proprietor of the note, competent to transfer it. He then made an advance in cash to Whitfield of $170, and took the note into his possession as a security. On the 19th of June, however, Ricks finally agreed to discount the note, taking off *ten per centum*, and applying the proceeds in the following manner: the sum of $270 to the satisfaction of a debt to the defendant Ricks, for money received by Whitfield as Clerk, of which the sum of $147 was received in February 1837, at which time the present plaintiffs were the sureties of Whitfield in his office; and the
[132] further sum of $230, in part satisfaction of a note given to Ricks by Whitfield and by one of the plaintiffs, Bunting, and one Arrington, as sureties; and the residue was paid in cash to Whitfield. Whitfield then, viz: on the 19th, endorsed the note without recourse, but antedated it, as of the 14th of June.

Shortly after the transaction between Whitfield and Ricks, the former absconded, and the Court allowed the official bond of the Clerk to be put in suit against his sureties for the benefit of the parties in the petition, as relators; which was accordingly done. Pending that suit, Ricks recovered judgment against Bunn and Cooper, but refrained from levying the money, because the parties to the petition gave him notice, that they should claim the money, and would sue him at once, if he proceeded to raise it. It was therefore agreed that it should remain as it was, until it could be seen whether the relators would succeed in the suit against the sureties; in which case they would interfere no further, and the sureties and Ricks might contest the matter between themselves.

The present bill was then filed by those sureties against Whitfield, Ricks, Melton, Zaney Lewis and the other relators in the action at law, submitting that the plaintiffs were liable to the relators, but insisting that there was a primary liability on the part of Melton and Ricks as the wrongful disposers and

holders of the fund belonging to the relators; and that the relators ought, therefore, to have recourse to them or one of them.

The prayer was, that the debt of Bunn and Cooper might be declared to belong in this Court to the relators at law, and that the money, if raised by Ricks, or, if not now raised, that the same might be raised, and might be applied to their satisfaction, in exoneration of the plaintiffs.

Battle, for the plaintiffs.

The *Attorney General*, for the defendant Ricks.

B. F. Moore, for the other defendants.

Ruffin, Chief Justice, after stating the case as above, proceeded as follows: Several matters are quite evident in this case, which, we think, are sufficient to authorize the relief of the plaintiffs. The debt which is the subject of the contro- [133] versy justly and equitably belongs to the parties to the suit in the County Court. The security for it was taken under the directions of the Court, by an officer of that Court, and the money was to be collected by another officer of the Court, for the benefit of those parties. This latter person, instead of faithfully preserving the security thus entrusted to him officially, disposed of it for his own purposes. Now if Mr. Ricks admitted himself to have been aware that Mr. Whitfield was employing for his own use, that which had been confided to him for the use of others, it would be but enforcing a principle of common honesty to hold, that in discounting the note with that knowledge, and applying the proceeds as was done, he made himself accessory to, and responsible for, the breach of trust; he being one of the instruments in effecting it, and a partaker in the profit of it. Mr. Ricks could not hold what he knew his assignor could not in conscience convey to him.

But it is said that Ricks had not such knowledge, and did not intend a wrong to any one, but was himself deceived by statements and appearances that removed, and were sufficient to remove, from his mind every suspicion of an improper disposition of the note. If this were true, the owners of the note would have no cause of complaint against him, but have to submit to his gain by their loss. But it cannot be yielded, that

the circumstances were not sufficient to excite suspicion, or that there were any that could properly allay all suspicion.

The circumstances, on which the argument of good faith is based in his answer, are, that the note was made payable to Melton or order; that it was endorsed by Melton to Whitfield, as in ordinary transactions, so that the legal title was in Whitfield; and that Whitfield moreover represented himself really to be the owner.

It is first to be remarked in respect to the form of the instrument or of its transfer, that it is not at all material to the present inquiry, except so far as it involves a presumption of the knowledge or ignorance of the continuing interest of the persons for whose benefit the note was taken. No doubt, to an entire stranger to the previous part of the transaction, the note, when taken by Ricks, would have presented the appear-
[134] ance of belonging wholly to Whitfield, and to have always belonged to him or Melton, exclusive of an interest in any other person. But those appearances would have deluded only a stranger. One acquainted with the origin of the note would know that other persons besides Melton and Whitfield had been interested in the note, notwithstanding the inference to the contrary from the mere form of the paper; and therefore might—nay must—reasonably conclude that interest continued, as there was nothing from them to extinguish it. This last is Mr. Ricks's situation instead of being that of the stranger.

That he fully knew that Whitfield had cajoled Melton out of his endorsement, or that he may not have been lulled by that endorsement into false security, or that he was actually cognizant of Whitfield's dishonest misapplication of the note, cannot be insisted on under the circumstances in which the cause is heard. The answer positively denies that Ricks actually knew or believed that the note did not belong to Whitfield, and affirms his belief at the time, from Melton's assignment and Whitfield's declarations, that it did belong to the latter.

But much less than actual or particular knowledge in detail is sufficient to convert a person into a trustee, who co-operates with a dishonest trustee in an act amounting to a breach of trust. Constructive notice, from the possession of the means

of knowledge, will have that effect, although the party were actually ignorant, but ignorant merely because he would not investigate. It is well settled, that if any thing appears to a party calculated to attract attention or stimulate inquiry, the person is affected with knowledge of all that the inquiry would have disclosed. This principle we deem decisive of the present case.

To say nothing of Whitfield's known necessities and suspected insolvency, or his previous official defalcations, or the false appearance attempted by antedating the endorsement—and admit that Ricks believed his representation, singular as in some respects it was; yet there are other facts undeniably known to Ricks, which should have prevented such confidence in Whitfield, and which suggested inquiries in quarters [135] where the whole truth must have been readily learned.

Ricks knew why the sale was made; by what authority; and for whose benefit; and he knew that this was the note taken at that sale. From the nature of the sale, he must have known that Melton's duty was to report the transaction to the Court and to dispose of the note according to the order of the Court, and not without such order, or the directions at the least of the persons entitled to the money. Yet to not one of those sources did he apply for information, notwithstanding explanation was so obviously called for. He insists that he believed Whitfield; and especially that he relied on the confirmation which Melton's assignment would naturally create. It is clear that Ricks did not at first believe Whitfield; for he required Melton's endorsement. When obtained, the answer seizes on it as constituting a formal legal authority in Whitfield to transfer the note, inasmuch as the note was payable to Melton or order, without a reference to his character in making the sale. But, at the same time, this defendant is obliged to admit that he was aware of that character and of the interest in the sale of the parties to the suit by petition. Then Melton's endorsement could satisfy Ricks of nothing, in respect of his authority from the Court or those parties, to change the security for the debt by giving to Whitfield this note for his own. At most, that endorsement only carried the matter one step further back, and induced the suspicion that Melton, through design or ignorance,

was committing a breach of duty. One who knew that, in its inception, the note belonged beneficially to the parties to the suit, could not justifiably rely on any endorsement, not even of him to whom the note was payable, without first ascertaining that those beneficial owners had parted from their interest, or that they or the Court had given authority to the person thus disposing of what—at least at one time—was not in fact his, although it so appeared to be. Neither the Court nor those parties ever did any thing of the sort in this case; and so Ricks would have learned, had he applied to the record, or inquired of Melton, or either of the other parties.

[136] Had Mrs. Lewis, then, and the other persons who have the same title, claimed by their bill the debt as theirs in this Court, there is no doubt that Ricks must have been considered as affected with notice of the rights of those parties; and that the Court must have declared, that as the note was held by Melton and Whitfield, so it is held by Ricks also, for their benefit.

Ought not the same relief to be given at the instance of the present plaintiffs, the sureties of an insolvent principal? We think so, upon the principle on which sureties ordinarily receive the assistance of this Court. First, the creditors ought not to raise the money from the sureties, when the creditors can follow their original security specifically and effectually: and secondly, the sureties are entitled to the benefit of all the remedies and securities that were in the power of the creditors.

The creditors may certainly look to the Clerk's sureties, if the note itself cannot be recovered, or its proceeds subjected in the hands of the holder. We think it but reasonable too, that the creditors should have proceeded, in the first instance, on the Clerk's bond. That was a plain and direct remedy, and, as stated in their answers, it was uncertain whether notice of their rights, either actual or constructive, would be confessed by Ricks, or otherwise established. In that state of things, the sureties could not impose on the creditors the delay, risk and expense of an equity suit against Ricks. But the question is presented now in quite a different aspect. The sureties have themselves undertaken the task and expense of bringing Mr. Ricks to answer, and of establishing such knowledge by him at

the time he took the note, as converts him into a trustee for the creditors, if they will look to him as such. They ought to do so and spare the sureties, because Ricks participated in the wrongful attempt to deprive them of their security, and thereby rendered himself directly answerable to them. Besides, the fund, as the property of the claimants, ought to be taken, since it can be had, instead of leaving it in the hands of a person, who, in the view of the Court, did not come by it in good faith, for the sake of making the present plaintiffs responsible for it as lost.

But it is said the equity of the plaintiffs is repelled by the nature of their obligation, as they contracted to be [137] responsible for the frauds and other mal-feasances of the Clerk, as well as for his non-feasances. Admit it; but to whom are they to be responsible? To those who can complain of a violation of official duty, as an injury to them; but not to one who culpably aided or concurred in such breach of duty. The defendant Ricks cannot therefore urge this objection. The other class of defendants, the creditors, ought not; because they have no interest either way; as they are to be paid at all events, and they cannot but see that as between themselves and each of the other parties, that is to say, the plaintiffs in this Court and Mr. Ricks, the former are innocent in this transaction, while the latter is quite the contrary. This is a sufficient reason why the creditors should take their remedy against Ricks; or if the present plaintiffs had paid the creditors, why the plaintiffs should not be reimbursed out of the fund in the hands of Ricks, upon the principle of subrogation.

The answer of Ricks further claims, that he should be at least allowed to retain the sums which were applied to debts for which the plaintiffs or some of them were liable, as he says, upon other transactions. As to the portion that was applied to the bond in which Arrington and one of the plaintiffs, Bunting, were sureties, it is sufficient to say that it cannot be allowed for want of mutuality. The demand of the plaintiffs is joint, and cannot be partitioned so as to allot a share to Bunting by way of satisfying the part of the bond for which he may be liable as between himself and his co-security, Arrington, who is not a party to this suit. The counter-demand of Mr.

Ricks is in the nature of a set-off, and ought, therefore, to be between the same parties.

The answer leaves us in the dark with respect to the nature of the other demand for $147, said to have been paid into the Clerk's office. It does not specify by whom paid; in what suit; whether on execution or voluntarily; or whether Ricks was the legal or equitable owner of it. In short, there are no allegations upon which it can be seen that the plaintiffs are legally responsible for that sum. If they be, Mr. Ricks can subject them in an action on the Clerk's bond. We do him no injustice in declining to act here on the vague statement of his answer.

The result is, that the debt of Bunn and Cooper in the [138] hands of Ricks must be declared subject to the satisfaction of the demand for which the plaintiffs were sued at law, and be brought into Court, that it may be applied thereto, if the plaintiffs have not already satisfied the demand of the relators in the action at law, or be applied to the reimbursement of the plaintiffs, if they have so satisfied the relators. The necessary inquiries will be made upon those points, and of the amount of the respective debts and recoveries. The defendant Melton must pay his own costs; and the plaintiffs must pay the costs of Mrs. Lewis and that class of defendants; but the defendant Ricks must repay to the plaintiffs the sum to be so paid by them, and also all the plaintiffs' own costs both at law and in this Court.

PER CURIAM. Decree accordingly.

NOTE.—The main principle decided in this case has been recognized and followed in *Powell* v. *Jones*, 1 Ired. Eq. Rep. 337; *Fox* v. *Alexander*, Ibid. 340; *Exum* v. *Bowden*, 4 Ired. Eq. Rep. 281; *Barnawell* v. *Threadgill*, 5 Ired. Eq. Rep. 86; *Gray* v. *Armistead*, 6 Ired. Eq. Rep. 74; *Bradshaw* v. *Simpson*, Ibid. 243; *Wilson* v. *Doster*, 7 Ired. Eq. Rep. 231; *Smith* v. *Fortesque*, Busb. Eq. Rep. 127; *Barnawell* v. *Threadgill*, 3 Jones' Eq. Rep. 50. It seems that there is a difference between the sale of notes or bonds by an executor or administrator, and by guardians or other persons holding them in trust. Hence it has been held, that an administrator has a right to sell notes of hand, as well as chattels, belonging to his intestate's estate, and the sale itself is no breach of duty; and the purchaser, even at a discount, shall not be liable to creditors or others unless he is privy to a misapplication of the price, or where he receives it in payment of a debt due to him individually, or otherwise has notice that the administrator intends to commit a fraud. See the above cited cases of *Gray* v. *Armistead*, *Brad-*

shaw v. *Spencer*, and *Wilson* v. *Doster;* and see also *Polk* v. *Robinson*, 7 Ired. Eq. Rep. 235.

On the subject of set-off, see the case of *Jones* v. *Gilreath*, 6 Ired. Rep. 338.

GEORGE W. BROWN et al. *v.* JAMES J. LONG et al.

When a debtor has been discharged under the act for the relief of insolvents, so that his body cannot be again taken in execution for the debt, any *choses in action* or other property not subject to an execution at law, which he may afterwards acquire, may be reached in equity; for the statute having declared that no execution shall be again issued against the body of the discharged debtor, but that one may issue against "any estate" which he may subsequently acquire, it is the duty of the Court of Equity to provide a remedy for the creditor when the estate of the debtor is of such a nature that it cannot be reached by an execution at law.

Any equitable property of a debtor may be reached in equity by a creditor, provided it would be subject to execution if the equitable interest of the debtor were the legal interest in possession.

But whether generally *choses in action* may be so reached by a creditor in all cases where execution cannot be done on visible and tangible estate of his debtor. Qu?

The defendant, Long, was indebted to Campbell, one of the plaintiffs, in the sum of $1000, and executed his bond therefor with Brown, another of the plaintiffs, his surety. On that bond Campbell took judgment at law, for principal, interest and costs; and thereupon issued a *capias ad satisfaciendum*, on which Long was arrested, and from which he was, in 1833, discharged as an insolvent debtor. The plaintiff, Brown, subsequently made a satisfactory arrangement with Campbell for the debt, and took an assignment of the judgment to the other plaintiff, Cowan, in trust for Brown.

The defendant, Long, was also indebted to the plaintiff, Brown, on another account in the sum of $463 74; for which judgment was rendered, and Long arrested in [139] 1833, and discharged as in the other case.

The bill was filed by Brown, Campbell and Cowan, against Long, Josiah Huie, Robert Huie, John H. Hardie, William Chambers and Samuel Hargrove. It set forth the foregoing facts, and then alleged that Long had no visible estate out of which any part of those debts could be satisfied; but that since

his discharge from imprisonment, he had been engaged in certain profitable speculations, upon which Josiah Huie became indebted to him in the sum of $1115, for which he executed his bond dated the 30th day of December 1836, and payable to Long; and Robert Huie became indebted to him in the sum of $1300, for which he also executed his bonds payable to Long. The bill further stated that Long endorsed the bond of Josiah Huie in blank, and delivered it to Hardie, and he then delivered it to Chambers; and that Long also endorsed the bonds of Robert Huie to Hargrove, and delivered the same to him. The bill charged that those assignments were wholly without consideration and merely colorable; the same being in secret trust for Long, and intended to enable the assignees to collect the moneys for the use of Long, and to avoid the payment of the judgments against him and elude any process that could be legally issued thereon.

The bill then charged that the plaintiffs had no remedy at law in the premises, and could not find any estate liable to their debts, unless in this Court the debts belonging to Long as aforesaid could be applied thereto; and the plaintiffs thereupon prayed that Long might be enjoined from receiving those moneys from any of the said parties in whose hands they might be, that all the parties might be restrained from further negotiating the securities, that a receiver might be appointed, and that the debts to the plaintiffs might be decreed to be paid thereout.

To this bill the defendants all appeared and put in a general demurrer, for want of equity; and upon the argument of the demurrer, his Honor sustained it and dismissed the bill with costs; whereupon the plaintiffs appealed.

D. F. Caldwell, for the plaintiffs.

W. A. Graham and *Boyden*, for the defendants.

[140] Ruffin, Chief Justice, having stated the case as above, proceeded as follows: The counsel for the plaintiffs, as a ground for reversing the decree, has endeavored to maintain the general proposition, that equity will, on behalf of any judgment creditor, lay hold of the stock or *choses in action* of the

debtor, and apply them in satisfaction of the debt, if execution cannot be done on visible and tangible estate.

With respect to the equitable property of a debtor, there seems to be no doubt of the correctness of the rule as laid down, provided the thing would be subject to execution if the equitable interest of the debtor were the legal interest in possession. But we believe the Courts in this State have never yet carried the principle far enough to embrace legal *choses in action*. In *Harrison* v. *Battle*, 1 Dev. Eq. Rep. 537, Chief Justice HENDERSON observed, when the question of a pure debt arises, it will be time enough to consider whether it cannot be reached. We think with him, that the question is too important to be determined, until it shall so arise that its decision will be essential to the decision of the cause. The decisions of the Courts of New York in the affirmative would receive the utmost consideration, both from the respect due to the learning of the Judges and to the intrinsic force of their reasons. It must, however, be observed, that the opinion of Lord THURLOW was explicitly given the other way; and seems to have been approved more than once by Lord ELDON. Moreover, it has been found necessary, or at least useful, to sanction and regulate the doctrine in New York by statute. Upon this occasion, however, the Court leaves the question as it is found; since the state of this case enables and requires the Court to overrule the demurrer upon a principle much less extensive than the one urged by the counsel, and for which we have the authority of a decision in point by Lord HARDWICKE. We think there is a strong and evident equity for the plaintiff arising out of the discharge of Mr. Long as an insolvent debtor, which operates as a complete protection of his person under the statutes. That circumstance distinguishes this from ordinary cases of judgment debts; in which the creditor can, by taking the body in execution, compel satisfaction by an assignment of the *chose in action* of the debtor. Although a creditor may [141] not, therefore, have the right generally to come into this Court for satisfaction out of his debtor's debts, because the Court must take notice that the law gives him the *capias ad satisfaciendum*, and gives it as an adequate remedy, and therefore equity cannot say it is inadequate; yet for that very reason,

this Court must interpose in a case in which the party has lost the *capias ad satisfaciendum*, and the law gives no other remedy in its stead, although at the same time the plain intent of the legislature was that the creditor should be paid. From necessity, therefore, lest there should be a defect of the justice meant to be provided for the creditor, the plaintiff is entitled to be relieved by force of the act of 1793. Rev. Stat. ch. 58, sec. 16. The seventh section of the act of 1773 not only exonerated the person of the debtor, but enacted that the judgment shall be held to be satisfied, and that no execution shall issue against any estate which the debtor may afterwards acquire. This provision, taken in connexion with other parts of the act for the assignment and distribution of the debtor's estate, made this a statute of bankruptcy in substance. Then comes the act of 1793, "to alter and amend" the act of 1773. It begins by reciting the former enactments respecting the judgment being satisfied, and the denial of execution; and then proceeds to recite further, that it had been experienced that those sections had been frequently productive of fraudulent conveyances, to the injury of creditors, and appeared to the Assembly against good morals; and then it repeals those provisions of the former law, and enacts that, after the passing of that act, execution may issue against any estate afterwards acquired by the insolvent debtor. We think it plain, that the legislature meant the act of 1793 to be substantially beneficial to creditors; and that while it gives an execution on which tangible property afterwards acquired can be taken and sold, it follows, in a case in which an interest of the debtor equally valuable with tangible property exists, but which cannot be reached directly for the want of any suitable process against it, nor indirectly for the reason of the exemption of the debtor's person, that the
[142] Court of Equity must see that the statute is executed in those points, in which the Courts of law are inefficient.

The fund out of which the plaintiffs ask satisfaction, it is admitted by the demurrer, belongs to the debtor, Long, and also that the securities have been transferred without consideration and in trust for him, and collusively kept on foot to elude the payment of those debts. It is an interest acquired subsequently to the discharge of Long; and the case is within the mischief

the act was intended to remedy, and therefore within the remedial power of some Court, and not being within that of a Court of Law, falls into that class of the duties of the Chancellor which forbids him to allow a right to fail for want of an adequate legal remedy.

Upon views like these the case of *Edgell* v. *Haywood* and *Dowe*, 3 Atk. 352, was determined by Lord HARDWICKE, upon one of the insolvent debtors' acts, called the Lords' acts, passed 10 Geo. II, ch. 26; in which, after discharging the person, "it was *provided* that creditors might take out a new execution against the lands and goods, &c., as they might have done had the prisoner never been taken in execution." Upon the bill of the creditor against the debtor, and the executor of a will in which a legacy was bequeathed to the debtor, it was decreed that an account should be taken of the debt to the plaintiff for principal, interest and costs, at law and in equity, and also an account of what was due for the legacy, and that the latter should be applied in satisfaction of the former. It is argued on the part of the defendants, that our act gives no more countenance to the jurisdiction, than the principles of general equity did before the act. It is said, that under the former law the debt was declared to be satisfied, and that this must be taken liberally in favor of poor debtors, and that therefore, although this was altered by the subsequent act of 1793, the alteration cannot be extended beyond the words of the latter act, which are "that execution may issue against any estate," &c. But we think the spirit of the act is inconsistent with the literal interpretation insisted on.

The same argument was urged in the case before Lord HARDWICKE, upon the words of that statute, which have already been quoted, and give much more color to the [143] argument than those of our act. But he held the act to be beneficial to the creditor, and therefore not confining him to the same remedy by execution, as before the statute; and relief was given because the Court looked upon the legacy "as a part of the property of the debtor which the creditor could not come at without the aid of the Court."

The judgment is put distinctly upon the loss of the *ca. sa.;* for although the remedy, through the grace of the crown, upon

an outlawry, is also mentioned, yet that does not alter the principle, which is not that the remedy at law was more or less efficacious; but that when the right of the creditor to demand the person of the debtor ceases, there is, in regard to property thus situated, *no* remedy at law.

If that was so upon those words which were put into that act by way of *proviso*, much more plainly correct is such a construction of our act. It passed twenty years after that it alters and amends, and professes as the reasons for altering the previous provisions, that they were against good morals and led to fraudulent conveyances. To what is allusion here made? We think very clearly to the bad morality of a debtor, whose person the law had benignantly delivered, keeping back any thing in any form from the satisfaction of his just creditor. Therefore, when the act gives an execution against the debtor's estate, the provision is not to be so construed as to be illusory, or so as to put it in the power of the debtor to elude it, "against good morals." On the contrary, an *effectual* execution is meant; and as that cannot be had at law, this Court, in conformity to the purposes of the legislature, must give it. The act not only repeals parts of the previous law, but upon its face is affirmative and remedial in its enactments; and in that spirit this Court must give effect to it by decreeing relief to creditors here, upon the ground (if no other) that the law intended they should be satisfied, and that they cannot be satisfied by any other means than those in the power of this Court.

The decree must therefore be reversed with costs, and the cause remanded, that the defendants may answer, and other proceedings be had according to the course of the Court.

Per Curiam. Decree reversed.

NOTE.—The act of 1793 (1 Rev. Stat. ch. 58, sec. 16,) is contained in the Revised Code, ch. 59, sec. 24. See, in support of the principle herein decided, the cases of *Frost* v. *Reynolds*, 4 Ired. Eq. Rep. 494; *Kirkpatrick* v. *Means*, 5 Ired. Eq. Rep. 220.

ELISHA SCULL et Uxor *v.* LEMUEL JERNIGAN et al. [144]

The proceeds of land sold for partition under the act of 1812, (1 Rev. Stat. ch. 85, sec. 7,) to which an infant is entitled, remain real estate, until the infant comes of age and elects to take them as money; and if the infant be a female and marry, and her guardian, to whom such proceeds had been paid by order of the Court of Equity, pay the same to her husband, upon her death they will descend as land to her real representatives, and this whether she married and died before or after she came of age; if in the latter case she never elected herself while sole to take such proceeds as money, nor consented, in the manner provided by law, after marriage, that her husband should so take them.

Jacob Sharpe died intestate, seized of lands in fee and leaving seven children; of whom an infant daughter, Elizabeth, was one. Upon a petition in the Court of Equity for partition, a sale of those lands was ordered and made by the Clerk and Master, who received the purchase money, and, by order of the Court, paid it to the several heirs equally—the share of Elizabeth being paid to her guardian. In March 1833, she intermarried with the defendant Jernigan, and in January 1834, died without having had issue. In July 1833, the guardian of his then wife settled with Jernigan, and paid to him her estate, including her share of the price of the land. The heirs at law of Mrs. Jernigan were her sister, Mrs. Scull, and five brothers; of whom four conveyed to Scull all their part of her estate.

The bill was brought by Scull and wife against Jernigan and the brothers, and it prayed that Mrs. Jernigan's share of the proceeds of the land might be declared to be real estate, and to belong to her heirs, and that the assignments to Scull might be established, and such parts of the fund as he or he and his wife might be entitled to might be decreed to be paid to them.

The answer of Jernigan insisted that he received his wife's estate in money, without reference to what it originally consisted in; and therefore that he received it as personalty and was the owner of it.

In the Court below there was a decree for the plaintiffs, that Jernigan should pay one sixth part of the fund, with interest since the death of his wife, to Scull and wife as her share, and

four sixths to Scull as belonging to him under the assignments. The defendant, Jernigan, appealed.

[145] *Iredell*, for the plaintiffs.

No counsel appeared in this Court for the defendant.

RUFFIN, Chief Justice, after stating the case as above, proceeded: We think the distinct terms of the act of 1812, 1 Rev. Stat. ch. 85, sec. 7, furnish a plain answer to the single question arising between the defendant and the plaintiffs. The act is addressed to the Court of Equity, a well known doctrine of which was, that land may be considered as money and money as land, according to the conversion made or to be made by the mandate of the law or the directions of the former owner. After enacting that there may be a sale of land for division, the statute then further enacts, by way of *proviso*, that if a party be an infant, *feme covert*, *non compos*, *&c.*, the part of the proceeds of sale, to which such person is entitled, shall be so invested or settled, that the same shall be effectually secured to the person so entitled, or his or her real representative. The last are the material words, as the question is, how the fund is to be treated after the death of the party, when claimed by the two classes of representatives, personal or real. To that purpose, the language is unequivocal. It is secured to the real representative; and is, of course, land in this Court. The import of the statute is, that as to such parties as could not, for want of capacity, consent to a conversion of their land into money, the sale—necessary to some purposes, and therefore authorized by the legislature—should not operate as a conversion. The money is, therefore, as much land, as if the act directed it to be a realizing fund, and reinvested in other land in severalty. It is true this character is not indelible, but the person entitled may elect to take it as money, and any act that denotes that intention will be sufficient to remove the character of realty that attached to it. But to have that effect the election must be made by the person entitled, and not by another for him or her; and that person must also be capable in law of making the election. Consequently, it can never be done by one *non-sane* or an infant; nor by the committee or guardian of

such persons; and the Court never interferes so as to change the course of succession. Whether therefore the fund remain in Court; or be, by the direction of the Court, invested in stocks by an officer of the Court; or be invested in [146] like manner, or in mortgages, or let out on personal security by a guardian; in all these conditions the nature of the fund continues unchanged, and the investment is only for the purposes of profit, and not of conversion. Had Mrs. Jernigan died an infant and unmarried, there can be no doubt that her heirs could have followed this money in the hands of her guardian, as real estate. There is nothing in the case to alter their rights. It does not appear, indeed, what was her age when she married and died. But although a married woman may, in a particular manner, elect to have the money paid to her husband, there was in this case nothing done with that view by the defendant's wife. She is permitted to dispose of the money, because equity follows the law, and there is a legal method by which she could convey the land, if it had continued land. For this purpose the course of the Court is to take the consent of the wife upon privy examination, either in Court or by commission in the nature of a *dedimus potestatem*. But without such assent the person who has the fund as trustee for the wife has no authority to pay it to the husband; nor has the husband a right to receive it. Such unauthorized payment and receipt cannot therefore affect the nature of the fund; and it remained real estate.

The decree consequently did no injustice to the defendant, and as to him, ought to be affirmed with costs. But it must be somewhat varied as respects the rights of the husband and wife, as between themselves. It directs the wife's share to be paid to the husband and wife; which in effect, is to pay it to him. Now, the ground of the decree for the plaintiffs is that the money is, as to them, land; which makes it the duty of the Court to secure the *feme's* share for her or her real representatives, unless she chooses to part from it in the regular method. So much of the decree as directs the payment of that share to the plaintiffs must be remodelled and the money ordered to be brought into Court, that it may be properly invested and settled.

Per Curiam. Decree accordingly.

NOTE.—The act of 1812 (1 Rev. Stat. ch. 85, sec. 7,) is contained in the Revised Code, ch. 82, sec. 7 and 8. In accordance with the decision in this case, see *Dudley* v. *Winfield*, Busb. Eq. Rep. 91, and *Bateman* v. *Latham*, 3 Jones' Eq. Rep. 35.

[147] MARY LOCKE *v.* JOHN ARMSTRONG et Uxor.

Where an administrator purchased a female slave at his own sale and accounted with the distributees for the price, and was permitted to hold the slave and her increase for forty years and upwards without any claim or demand from them, *it was held*, that if the reception of the price of the slave did not amount to a confirmation of the sale, yet acquiescence for so long a time would have the same effect; that such laches must deprive a party of all right to open what was apparently closed so long, whatever might be the subject of the transaction; and especially ought it to have that effect in the case of female slaves, from whom in the mean time a numerous progeny might spring.

The poverty of a party may account for his not bringing suit; but it cannot be a reason why he made no demand, nor made known his claim either to those against whom it was, or to any other person.

The bill was filed in July 1835, for an account and distribution of the personal estate of William McLelland, who died intestate in the year 1781. The intestate left a widow and three infant children, of whom the plaintiff was one; and administration of his estate was granted to John McLelland, William McLelland, and his widow Rebecca. He left a small estate which was exposed to sale by the administrators in November 1781, and including the price of a negro girl owned by him, brought the sum of £311 10s. 5d. The widow became the purchaser of the slave at £85 1s.; and she and her second husband, Armstrong, or those claiming under them, have held the slave and her issue ever since, without any claim on the part of the plaintiff, or any other person, until the filing of the bill. John McLelland, one of the administrators, was afterwards appointed the guardian of the plaintiff; and in 1791, the account current of the administrators was returned and audited by a committee of the Court, and stated the balance of the estate to be distributed between the three children, including the price of the slave, to be, after payment of debts, the sum of £248 7s. 8d., of which the plaintiff's share was £28 15s. 11d. principal, and then in the hands of her guardian. The plaintiff came of age

in 1794; and in that year, and the years 1796 and 1797 respectively, received a payment from her guardian, amounting altogether to the sum of £143 10s. 1d., and granted her several receipt therefor—the last being expressed to be her "legacy due from the estate of her father." A few months after the last payment, the plaintiff married and remained covert until the death of her husband in 1820. The bill stated that the plaintiff was, at the period of the payments to her, [148] of opinion that she had not received all she was entitled to, and particularly, that a share of the slave's hires and increase belonged to her; and that during her marriage, she repeatedly urged her husband to demand and prosecute her claim at law for them, which, however, he declined or failed to do; and that his affairs were much embarrassed at his death, so that she was left in distressed circumstances, and was unable to give security for the prosecution of a suit, before she brought the present suit.

The bill was brought against the widow and her second husband, she having survived the two administrators many years, and also against the other two children; and it prayed that the purchase of the slave by the administrators might be declared void, and that she and her profits and issue might be declared to be parts of the estate, and an account taken, and distribution according to right.

The answer of Armstrong and wife stated, that the price given for the slave was the full value, that it was included in the account of the estate on which the settlement was made, and the plaintiff's share ascertained; that the plaintiff was fully informed thereof and never expressed any dissent, but received her share willingly; and that during the three years that elapsed after the plaintiff's arrival at full age, before her marriage, she set up no claim for the slave, nor did her husband during his life-time, nor did the plaintiff for fifteen years after his death, nor until the filing of the bill; although during the whole time the parties lived in the same neighborhood. Upon the lapse of time and laches of the plaintiff and her husband, the answer insisted as a bar to the relief. The answer stated that the two administrators managed the estate and had the assets, and they had both been dead many years; and that the widow never had

in her hands any part of the estate, but what was considered her share, and she believed the whole estate was fully accounted for in the settlement.

Cook and *Boyden*, for the plaintiff.

D. F. Caldwell, for the defendant.

Ruffin, Chief Justice, having stated the case as above, proceeded: The litigation begun by the plaintiff at this late
[149] day, must, we think, under the circumstances of this case, be fruitless to her. The Court is satisfied that the plaintiff received through her guardian, and in the payment from him after she came of full age, her share of her father's personal estate, inclusive of the price of the slave. If she knew the fact at the time, the acceptance of the price was an election to abide by the sale, as being more beneficial to her, and amounts to a confirmation of it. Such the answer avers to be the truth. It is true there is no precise proof to the points that the plaintiff was fully informed of all the facts, or knew that she had a right to treat the sale as void and claim the slaves specifically. But such proof is not now to be expected. The remote periods at which the events occurred, and the deaths of the principal parties to the transactions, render it impossible to ascertain the actual facts, whatever they may have been. The cause must therefore be decided upon such reasonable and legal presumptions as arise from the conduct of the parties. They remove every doubt as to what the decision ought to be, and if express confirmation be not established, yet acquiescence in what was done for fifty-five years after the transaction, and more than forty after the plaintiff could act for herself, ought to have the same effect. Such laches must deprive a party of all right to open what was apparently closed so long ago, whatever might be the subject of the transaction. But it is peculiarly proper in reference to the case before us. One ought not to stand by and see another raising slaves at great expense of money, and taking the risk of their lives, without saying any thing, until in the event there is a numerous progeny and a good profit, and then claim the privilege of returning the money and taking a share in the slaves. Had the negroes died, the plaintiff

would willingly have kept the money. Having given no intimation to the contrary for half a century, she must retain the position she then took. Her laches deprives her of the right to invoke the aid of the Court for the correction of what she has so long acquiesced in, and what cannot be corrected without serious loss and gross injustice to the opposite party.

There is an attempt to account for and excuse the delay by the poverty and distress of the plaintiff since her [150] widowhood. But it entirely fails. To say nothing of her being of age three years before her marriage, and of the effect upon this question of the power and absolute right of the husband to sue for, receive, or release, a personal legacy or distributive share belonging to his wife, the proof of the distressed circumstances is unsatisfactory. It does not make out a case of such destitution as marks that to have been a real difficulty in the party's way, and the true cause of the delay. The circumstances of the plaintiff were straitened; but she had dower in a fertile tract of land, on which she brought up a large family of children. But had it been otherwise, it would not have altered the result. It might have accounted for the plaintiff's not bringing suit, but it could not be a reason why she made no demand, nor made known her claim either to those against whom it was, or to any other person. It does not appear that the plaintiff or her husband ever uttered one word of intimation to any person whatever of dissatisfaction with the settlement made by her, or of any interest in, or claim to the negroes up to the moment of filing the bill. Poverty may restrain one from going to law, but it rather increases the disposition to complain of injustice, especially at the hands of relations, from whom it is to be least expected. Total silence for so long a time, admits of but one explanation—that it grew out of the party's assent at the time or a subsequent approbation. The bill must be dismissed with costs.

Per Curiam. Bill dismissed.

NOTE.—See accordingly the late case of *Davis* v. *Cotten*, 2 Jones' Eq. Rep. 430, in which the following distinction is taken: Where a trustee is invested with an *estate*, or an unclosed trust, no length of time will bar its recovery. But where a mere *equitable right of action* exists, it must be enforced in a reasonable time, or else, for the sake of repose, it will be considered as having been aban-

doned, released, satisfied, or in some way arranged. In that case, it was held further, that the application of the statute creating a presumption of payment, or abandonment, &c. (see Rev. Code, ch. 65, sec. 19,) does not depend upon the party's knowledge of his rights. See also *West* v. *Sloan*, 3 Jones' Eq. Rep. 102.

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[151] JOEL JENNINGS et al., Ex'rs of LEMUEL JENNINGS, *v.* ELLIOT SYKES et Uxor.

A trustee cannot claim from the *cestui que trust* immunity from the consequences of a breach of trust, or indemnity against pecuniary loss from it: Therefore where a guardian procured an order of Court for the sale of slaves belonging to his ward, and purchased them himself, and afterwards claimed them as his own, *it was held*, that he could not, upon the ward's becoming of age and recovering the slaves in a suit at law, obtain, in a Court of Equity, remuneration for his expenses in keeping and maintaining them.

Lemuel Jennings was the guardian of Susan Harris, an infant of tender years, who was entitled to a negro woman and three children. The guardian obtained an order of the County Court for the sale of them, upon the ground that the ward had no other sufficient estate to defray the expenses of their support. At the sale, Jennings became himself the purchaser, through a friend, at the price of $101; which he credited to his ward, in the guardian accounts returned to court. He kept possession during his life, and the negroes increased to a numerous family; and at his death, his executors delivered them to the several persons to whom Jennings in his will bequeathed them. Actions of detinue were then instituted by Susan Harris against those several persons for the slaves in their possession respectively, and judgments obtained in the names of herself and Sykes, with whom she intermarried. Thereupon the executors of L. Jennings filed their bill against Sykes and wife, and therein further alleged, that their testator believed he had acquired a good title to the slaves, and under that belief, took possession of them as his own property, and laid out large sums of money and labor in their maintenance; but that the recoveries against his legatees were effected upon the ground that his purchase was a nullity. The bill insisted then, that Jennings held the slaves as guardian, notwithstanding his supposed purchase and his claim, and therefore that his estate was entitled

to be reimbursed those expenses. And the prayer was, that an account might be taken thereof, and that the slaves might stand as a security for the sum found due, and, in the mean while, for injunctions to stay the executions at law.

The defendants gave security to abide by the decree [152] that might be made, and the order for an injunction was thereupon discharged.

The defendants answered, that the sale was made for the purpose of defrauding the ward, and not honestly for the reason stated in the petition; and that both Jennings and his legatees claimed to hold, by virtue of his pretended purchase, in opposition to and defiance of the defendants' title; and they insisted, therefore, that the plaintiffs had no right to the compensation claimed, or if they had, that it ought to be recovered at law.

Iredell, for the plaintiffs.

Kinney, for the defendants.

Ruffin, Chief Justice, after stating the case as above, proceeded as follows: We are not aware of any equity on which the bill can be supported; and are of opinion that it must be dismissed. If the defendants had found it necessary to seek their redress here, their obligations to remunerate the plaintiffs for outlays, of which they derived the benefit, might perhaps be recognised. But that is not the case. The guardian did not clothe himself with the legal title, but the ward was able to recover at law upon her original title and without any help from this Court. The guardian has to resort to us, and he asks that the recoveries at law may be defeated, at least in part. The equity on which this is asked is, at all events, novel. It is one of this sort: That a trustee may claim from the *cestui que trust* immunity from the consequences of a breach of trust, or indemnity against pecuniary loss from it. We see no sound reason for such a principle. It is said, however, that there was no breach of trust; for the sale was ineffectual, and the title remained as before. But that only proves that by the providence of the law, the breach of trust was not as successful, nor the injury as great, as it was intended. Still it was a breach of trust, inasmuch as the guardian denied his ward's title, and

claimed and disposed of her negroes as his own. If a stranger had taken the slaves into possession as a wrong-doer, neither natural justice nor artificial equity would sustain a de-
[153] mand upon the innocent owner for outlays on the slaves, beyond the proceeds of their own labor. With even less face, it would seem, can one prefer the claim, whose office it was to take and keep possession for the owner, and who, contrary to his office, denied the owner's right and set up title in himself. If the title thus set up prove defective, the party must submit to the loss. He can look no further for remuneration; for his advances were made in confidence of his own title, and not on the faith of that of his *cestui que trust.* The relation between the parties cannot, therefore, affect the question; for every act, out of which the claim arises, was done without reference to that relation, and contrary to the duties incident to it. The bill must be dismissed with costs.

PER CURIAM. Bill dismissed.

NOTE.—The intimation in this case, that if the parties had found it necessary to resort to a court of equity to assert their claim, the other parties might have been entitled to a remuneration for their outlays in that court, is sustained by the directions for an account in the late case of *West* v. *Sloan*, 3 Jones' Eq. Rep. 102. The commissioner was directed to allow the defendants the necessary expenses of such of the slaves as were a charge in the raising of them.

MOSES WHITESIDES et al. *v.* DAVID WILLIAMS and DANIEL ALLEN.

An equity of redemption in a mortgage of slaves or other personal property, is not in law subject to an execution, the act of 1812 (1 Rev. Stat. ch. 45, sec. 5,) extending to the equity of redemption in lands only.

A party having a mortgage on a slave, will not, at the instance of a subsequent purchaser, be prevented from foreclosing it, upon the ground that he had another fund out of which he might obtain satisfaction, if that fund had not in fact been assigned, but had only been agreed to be assigned to him by the mortgagor, and the person who held the fund was no party to such agreement.

The bill was for a foreclosure of a mortgage. The defendant Allen purchased a slave named Ned, and other articles, at a sale made by the administrators of one Littleton Patillo. Allen was one of the distributees of the personal estate of Patillo; and at the sale he requested the plaintiffs to be his sureties in

a bond to the administrators, promising them that the administrators might retain his distributive share to satisfy the bond when it became due. The plaintiffs refused, unless, in addition thereto, the slave Ned should be mortgaged to them as a counter security for their liability. Upon this Allen executed the mortgage for the slave to the plaintiffs, and then gave the bond to the administrators, signed by the plaintiffs as sureties. Allen afterwards assigned his distributive [154] share to a third person, and became insolvent. A creditor of Allen had an execution levied upon his equity of redemption in the slave Ned, when it was sold by the Sheriff, and the defendant Williams became the purchaser. The plaintiffs were sued upon Allen's bond to which they were sureties, and were compelled to pay the whole amount of it. The bill sought to have the mortgage foreclosed, and that the slave should be decreed to be sold, and the plaintiffs indemnified out of the purchase money.

The bill was taken *pro confesso* as to Allen. Williams answered, and insisted that the plaintiffs should look first to Allen's distributive share for indemnity, and if that fund failed, then they might resort to their mortgage to supply any deficiency.

No counsel appeared for either party.

Daniel, Judge, after stating the case as above, proceeded: We think there are two answers to the defence of Williams. *First*, the equity of redemption in a mortgage of slaves is not in law subject to an execution. The Sheriff had no authority to levy on it, therefore he could transfer no title or interest to Williams as purchaser under his sale. The equity of redemption in *lands* is liable at law to an execution by force of the act of Assembly, 1 Rev. Stat. ch. 45, sec. 5, but the redemption of slaves or other personal estate is not embraced in the act. *Secondly*, Whitesides, by the mortgage, has the legal estate in the slave; and this Court would not prevent him foreclosing his mortgage and compel him to look to the distributive share which had never in fact been assigned to him, but rested only on Allen's agreement to assign, the administrators being no parties to that agreement; this is not a reason sufficient to pre-

vent a foreclosure. There must be an account taken, and if the defendants do not redeem by a day to be fixed, the slave must be sold and the plaintiffs' debt and cost paid out of the purchase money.

PER CURIAM. Decree accordingly.

NOTE.—The act of 1812 (1 Rev. Stat. ch. 5, sec. 5,) is contained in the Revised Code, ch. 45, sec. 5. The 4th section of the same act embraces, as will be seen, trusts of personal as well as real estate. In the case of *Bottle* v. *Petway*, 5 Ired. Rep. 560, it was held not to extend to any case in which the trustee could not voluntarily convey to the debtor the legal estate, without incurring a breach of trust to other persons, with whose interests he is also charged. This section of the act is confined also to trusts which would be enforced between the *cestui que trust* and the trustee, viz: an honest trust, and not one infected with fraud which the court would not act on at the instance of either party. *Page* v. *Goodman*, 8 Ired. Eq. Rep. 16.

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[155] JOHN D. GRAHAM, Adm'r of ELIZABETH E. GRAHAM, *v.* GEORGE L. DAVIDSON et al.

There is no trust which can be reposed in one person over the property of another, in regard to the management, whereof a full and detailed account is more imperiously demanded, than in that which the law confides to a guardian over the estate of his ward. Hence where an alleged settlement is set up by a guardian as a bar to an account, and it is not seen that any account was stated, nor what were the matters embraced within the attempt to settle, and the guardian himself will not swear, that so far as it went the settlement was correct, but leaves the ward to make full proof if he can that it was not correct, it will be no bar to a full account from the guardian.

Where an executor of an estate becomes guardian to the legatees, an account from the guardian necessarily requires an account from him as executor, for the purpose of ascertaining the funds which came or ought to have come to his hands as guardian.

Where one of two wards interested in the same estate makes a settlement with their guardian on behalf of himself and the other ward, the latter will not be thereby precluded from calling for a full account from the guardian, if he were not a party to the settlement.

When two co-executors make a joint return of inventories and accounts of sales, either will be answerable for what appears thereon, if he do not show what came to the hands of the other alone.

Where an executor returns an inventory of debts due the estate, without stating them to be desperate or doubtful, he will be held responsible for them, unless he can show that there were set-offs against them, or that the debtors were insolvent so that the debts could not be collected.

Where a testator, for the purpose of paying his debts and schooling his children, created a fund arising from the sale of his goods, the obligations due to him, and certain other claims, and then directed that his negroes at a certain period should be divided between his son and daughter, two-thirds to the son and one-third to the daughter, and that the hires of the said negroes should be divided in like manner, *it was held*, that the son took two-thirds of the negroes and their hires only, and that the property composing the fund for the payment of debts and schooling the children, not wanted for those purposes, was given equally to the son and daughter (who were the only children) by implication, or was undisposed of by the will, and therefore was to be equally divided between them as next of kin.

An executor cannot claim commissions upon his disbursements, if it appear that he has been allowed them upon the amount of the estate, and the court deem that allowance sufficient for his trouble and services.

A debt returned in one inventory without comment, will not be charged against the executor, if in a subsequent one, it be stated that the same was believed to have been paid to the testator, and the debt appears to have been due several years prior to the testator's death, and withal was barred by the statute of limitations.

In a devise of a certain farm and "all stock on the same," the words "all stock" will comprehend only the animals used with, supported by, or reared upon the farm, and will not include the plantation tools and the gathered crop that may be on it.

Interest, according to the usage of our courts, follows debt as its ordinary attendant, and is to be charged against an executor in his account without showing that he made interest or used the funds himself. And an executor in this State will be charged with interest on notes and other debts from the time they become due, and upon sales from the expiration of the time of credit, up to the settlement of the estate, if no interest account were kept to show that less interest was in fact received. [156]

In calculating interest upon payments made by an executor, consisting of a great number of small items, the commissioner may ascertain the amount of each year, and allow interest thereon from the middle of that year.

Where one person was appointed guardian of A, and a second of B, and they executed a bond as the joint guardians of both wards, and the first guardian delivered over money and effects belonging to A, to the other, *it was held*, that the first was the sole guardian of A, and the other was but his agent for whose acts he was responsible; or that if the guardians were to be considered as joint for both wards, still the first was responsible for the acts of the other, upon the principle that where, by the act or agreement of one trustee, money gets into the hands of his co-trustee, *both* are answerable for it.

An allotment of personal estate made to a widow upon her dissent to her husband's will, by a jury under the provisions of the act of 1784, (Rev. C. 204,) gives her at least a *prima facie* warrant to exact payment of the amount, and after the lapse of thirty years a payment will be presumed; and if a legatee file a bill for an account against the executor, in which he designs to impeach the validity of the assignment to the widow, she ought to be made a party so

that she may sustain it, and if she cannot sustain it, that she may be made liable in the first instance for what has been improperly received under it.

Upon a reference by consent to the master to state an account, and in doing so to set forth certain facts, an omission to set them forth will furnish no objection to the report, if it appear that they are not necessary for the determination of the matters arising on the pleadings.

Where the same person is both executor of an estate and guardian of the legatees, it is proper in his accounts as executor and guardian, to credit him in the first and charge him in the second, with a legacy given to his ward.

Charles Conner, formerly of the County of Mecklenburg, died in the month of January 1804, having previously duly executed his last will and testament in writing, whereof he appointed his wife Ann, the defendant George L. Davidson, Charles Harris, and Peter Epps of Virginia, executors, who all caused the said will to be proved and took upon themselves the trust thereby confided to them. The testator left surviving him his widow and two children, a son, Henry W. Conner, one of the defendants to this suit, and a daughter, Elizabeth Epps Conner. By his will he devised and bequeathed to his said widow, land and personal property during her widowhood; other personal property for life, certain negro slaves absolutely, and an annuity of one hundred dollars for five years. He devised to his son Henry several tracts of land, among which was one called the Greenwood Farm, "with all the appurtenances belonging to the said land, including all stock on the same," absolutely; also a tract of land called Given's, "if not needed to defray debts," and bequeathed to him several personal chattels, a good horse, carriage and harness, with a negro boy Jack, exclusive of his dividend of the others." The testator devised to his daughter several tracts of land, and bequeathed to
[157] her two beds and furniture, and two negro women, upon condition that if she should die before arriving to mature age, all the said property should descend to her brother; and further declared his will that she should be furnished with a horse, saddle and bridle. In a subsequent part of the will the testator directed that his store of goods should be sold in order to help to discharge debts, and that the obligations then in suit, and to be put in suit, should be collected and debts discharged therewith; and if there should be any overplus, the same to be put on interest for the use of schooling his two children, but in

case they should prove insufficient, Given's plantation to be sold. He further directed that the funded stock of the United States which he held in the loan office in Richmond, (Virginia,) should be removed to Raleigh, and the *interest* arising therefrom be put to the use of his children, and in case the interest should prove insufficient then the principal to be made use of, but if the interest be sufficient the *principal* should not be drawn until his son should come of age, "*which sum*, whatever it may be, is to be at his disposal." He further directed that application should be made to Mr. Wickham, of Virginia, respecting a decree in Chancery which was rendered in his favor against Likely, Wardrobe, and others, and whatever might be obtained thereon after payment of expenses, "to be put on interest for the use of his children with the general stock." The testator further declared his will to be that his negroes not before mentioned should continue under the jurisdiction of his executors during his wife's widowhood, or at least until his son should arrive at age, then a division thereof to take place as follows, two-thirds to his son, and one-third to his daughter, the negroes to be hired out in case his wife should marry before his son arrived at age, and the moneys arising from said hires to be put on interest and divided as before mentioned in the division of negroes.

After the probate of the will, the widow of the testator, under our act of 1784, (Rev. ch. 204,) caused her dissent to the provision therein made for her to be recorded, and thereupon a jury was summoned to allot unto her her dower in the lands of which her husband died seized, and also to allot and set off to her the one-third part of his personal estate to which she was, under the law, entitled. The jury, on the 18th [158] July 1804, made the allotment accordingly. In this, it was set forth that the personal estate of the testator was valued by them at $18,306 80, her third part whereof was $6,102 26; that they found this sum discharged in part by personal property bequeathed to her by the will, which property was specially set forth, with the value of each article, amounting in the whole to $3,043, leaving a balance of $3,059 26; that this balance was further lessened the sum of $620 56, by articles of personal property not willed, naming each and its value, and

reducing the balance to $2,138 66. The last item in this list was thus expressed: "The jury finds there is $100 annuity to be paid to the widow annually; the jury deducts $60 for prompt pay, $440." They concluded their return thus: "After the executors pay the relict the said $440, there remains due to the widow this last balance of $2,138 26." Peter Epps, one of the executors of Charles Conner, lived in Virginia, and transacted no part of the business of administering the estate in North Carolina. During the life of Charles Harris, the said administration was conducted by him and George L. Davidson, jointly. Harris intermarried with the widow in the latter part of 1804, or in the beginning of 1805, and died in 1805. The sole administration of the estate in North Carolina was thereafter carried on by Davidson. At the April Term 1809 of the County Court of Mecklenburg, George L. Davidson was chosen guardian by Elizabeth Epps Conner, and Robert Worke was chosen guardian by Henry W. Conner, and at the next July Term, Davidson and Worke executed a bond as joint guardians of the said Henry and Elizabeth. In the month of June 1815, the said Elizabeth, being then about 18 years of age, intermarried with the plaintiff, John D. Graham, and shortly thereafter a division was made between him and Henry W. Conner, of the negroes belonging to the latter and his sister. On or about the 1st of June 1821, Mr. Conner and Mr. Davidson made at attempt at a settlement respecting the latter's liability to the former and to his sister, upon his accounts as executor of their father, and as guardians; and thereupon Davidson executed his note to John D. Graham for the sum of $283 33, and to Henry
[159] W. Conner for the sum of $566 66, to secure the payment of the balances admitted by him to be due to them respectively. What were the debits and credits in that incomplete or attempted settlement is unknown; and the principles upon which it was made are also unknown, except that it was then supposed by the parties that under the will of Charles Conner, his son was entitled, after deduction of the widow's allotment, to two-thirds, and his daughter to one-third only of the personal property of their father, which was not exclusively bequeathed to one or the other of them. In the month of January 1825, Mr. Conner made a settlement with Robert

Worke, because of his guardianship as well of his sister as of himself, by which settlement a balance was found due from Worke of $537 78. And Worke having died in 1827, he caused an action to be instituted thereon against Worke's executors, and recovered judgment in the names of Henry W. Conner and John D. Graham and wife; but it did not appear whether any thing had been collected or could be collected upon that judgment. After ineffectual efforts to settle amicably between the parties, the present bill was instituted by John D. Graham and wife, and subpœnas sued out thereon returnable to the Fall Term 1829 of Lincoln Superior Court, against George L. Davidson, Henry W. Conner, and John Mushat and Mary Worke, executor and executrix of Robert Worke, deceased, in which they charged that they were not parties to the settlement between the defendants Davidson and Conner; that at the time thereof the plaintiff John was wholly ignorant of what was due to his wife, and received the note from Davidson, merely because Davidson and Conner represented that much to be due; that upon subsequently examining into the management of the estate upon the papers submitted by them for his consideration, he had found gross mistakes and errors; that there were omissions in the inventories returned by the executors of Charles Conner; that Davidson claimed commissions on the sum allotted to the widow of his testator and paid over by him; that he had claimed more than was right because of debts alleged by him to be desperate; that the account of the guardianship had never been settled; that Davidson had paid over to Conner more than the latter was entitled to [160] receive; in particular that he had paid over to Conner, as his, the proceeds of a large quantity of corn, cotton and tobacco that was on the Greenwood farm, one-half whereof belonged to the plaintiff Elizabeth; that he had accounted with, and paid over to the defendant Conner, two-thirds instead of one-half only, the said Elizabeth being entitled to the other half, of the sales of goods and of the debts due to Charles Conner; that the interest of the loan office certificates had not been applied to the education of the children of the said Charles, but the whole received by Henry W. Conner, of which they contended one-half was due to his sister; that they were no par-

ties to the settlement made by the said Henry with Robert Worke, nor to the judgment obtained thereon against his executors, and that the guardianship never had been settled; prayed that these (alleged) settlements might be opened, and that the defendant Henry should account for any excess he had received from Davidson or Worke, and for general relief.

The defendant Davidson answered and stated, that until the latter part of the year 1805, the management of the estate of his testator in North Carolina was conducted chiefly by Charles Harris, who had lived with the testator in his life-time, and in whose possession the bonds, notes and accounts were left for collection, but that after the said Charles's death, it devolved upon himself; said that it would be extraordinary if, in the management of so large an estate, thrown into confusion also by the dissent of the widow, there had been no mistakes; "that defendant, however, did not admit the errors charged, but left complainants to the proof thereof, more especially as the complainant John had had possession of the papers of the defendant since the settlement in 1821;" said, with respect to a particular debt, a judgment against James Kerr, the amount whereof was charged as left blank in the inventory, that he could not tell who collected it; but that the same with sundry others were at the time of taking that inventory in the hands of Harris, as appeared from a memorandum given to him by Harris at the time, and which by his answer, he declared that he had ready to produce; that Peter Epps managed the estate in Vir-
[161] ginia, which consisted of the funded stock and the demand against Likely, Wardrobe & Co.; that he received a small part of said funds but paid them over to the widow in part of her allowance, or to the said Peter, and was ready to produce the vouchers therefor when required; that the defendant Henry W. Conner might have received some part thereof, and believed that such was the fact, because the defendant held the receipt of the said Henry for the receipt which he, the defendant, took from Epps when he paid over a part of the funds. Defendant further stated in this, his answer, that "in the year 1821, the plaintiff John, the defendant Henry, and himself being all present, they fixed upon a day for a final settlement of the estate; that the said plaintiff declined attending, observing

that he would leave the matter to the said Henry to settle; that himself and the said Henry had a meeting, and an amicable settlement took place, so far as this defendant's responsibility extended; that the said John and Henry and this defendant again met, and the papers and settlement which had taken place were tendered to the plaintiff for examination, but it was declined, the said John still alleging that the said Henry knew more of the matter in hand than he did." He declared that "the division" was then made between the said John and the said Henry upon their own judgment, and that he executed his bond to each for the respective parts of the balance as arranged between them, and according to their directions, and he prayed to have the same benefit of these matters as though he had specially pleaded them. This defendant further answered that he and Worke became guardians of the children of his testator in 1809, and admitted that for two years he had control over the guardian fund, but said that about the year 1811 he handed over to Worke all the bonds for hire and rents which he had taken for the two preceding years, that Worke managed the whole concern of the guardianship afterwards, and therefore defendant insisted that he was not responsible for any mismanagement, if any such took place. He further insisted that "a settlement of the guardianship had taken place since Worke's death with his executors; that the guardian funds which the defendant had handed over to said Worke, were included therein, and a judgment rendered for the amount; and he insisted on these facts as though he had specially pleaded the same." [162]

Henry W. Conner by his answer admitted that there never had been any formal settlement between himself and the plaintiffs, and declared his willingness to have a full and correct settlement made under the directions of the Court; stated that he and the plaintiffs had at different times received money from Davidson and Worke as it was wanted, and that after coming of age he had frequently applied for money, and appropriated what was received as well for his sister's wants as for his own; he contended that under a fair construction of his father's will the residue of the personal property was to be distributed two-thirds to himself and one-third to his sister; said

that he was utterly unable to set forth what part of the estate was settled for by Davidson, either as executor or guardian, nor was he able to say what part had been accounted for by Worke otherwise than by the settlement which he made with Worke in 1825; that the plaintiff John, at the time of the settlement referred to with Davidson, was furnished by the latter with his vouchers both as guardian and executor, and was requested by the defendant to examine them, and assured that so far as *he* was concerned any error detected should be rectified; that he was yet ready, and always had been, so to do, and the moment he ascertained the dissatisfaction of the said John with the settlement so made, as well with Worke as Davidson, he proffered to the said plaintiff to submit the difference between them to the arbitration of any intelligent gentleman. In regard to the settlement with Worke, the defendant stated that he had been urged by the plaintiff John to bring Worke to a settlement; that this settlement was made (as defendant believed) in the presence of the said John; that it was signed only by Worke and this defendant; but that at all events a copy thereof was afterwards delivered to the said John; and that after Worke's death, the defendant, in order to secure whatever might be obtained from his estate, if any thing could be had, and certainly not with any view to prejudice the rights of the plaintiffs, caused the settlement to be put in suit, when a judgment was rendered to the benefit of one-third, whereof
[163] the plaintiffs were admitted to be entitled. The defendant contended, that by the construction of the will of his father he was entitled to every thing that was on the Greenwood farm, and that the plaintiffs had improperly received a part thereof; stated that he had received of the Likely debt about $320 from Peter Epps in Virginia, the one-third whereof he had accounted for to the plaintiffs; that he had no recollection of having received more, and believed that the residue had been applied to the payment of his father's debts in Virginia, and to the support of himself and his sister, except a small balance which he believed to be in the hands of the representatives of Peter Epps, and the sum of about $270 then in deposit either in the United States Branch Bank at Richmond, or in the office of the clerk of the Federal Court in that city. With

regard to the funded debt, the defendant stated, that when he arrived at age he received the whole that was then unpaid, the residue having been applied as directed by the will. To this the defendant denied that the plaintiffs had any claim; and the defendant further set forth certain credits which it is unnecessary now to particularize, but which he claimed to be allowed him in account with the plaintiffs.

The executors of Worke relied in their answer upon the settlement made by their testator in his life-time, and the judgment thereon rendered after his death, as establishing what was due from him; denied that they knew of any errors therein, and alleged that they had fully administered all the assets of their testator before they were served with process in this suit.

To these answers there was a general replication, and thereupon, and before a hearing of the cause at the Spring Term 1830, it was ordered that it be referred to the Master, with the assistance of Thomas Dewes, Esq., to take an account of the estate of Charles Conner, deceased, which came into the hands of the defendant Davidson, as his executor, and how the same had been expended; and in that report to set forth what amount of money or property was set apart by the will of the said Conner for the payment of debts, what amount was set apart for educating his children, and how expended, and on whom; what amount was for distribution and how divided; and what sum or property was undisposed of by the will; and that [164] the report set forth the sums which came into the hands of George L. Davidson and Robert Worke as guardians, and how disbursed. At the subsequent term, in 1830, it was ordered that it be referred to the Clerk and Master, to take an account and report; that he have power to call the parties before him, and examine them on oath. At the Spring Term 1831, the Clerk and Master made his report, and at the same term it was ordered that the rule of reference at the last term be amended so that the reference be without prejudice. To the report, exceptions were taken by the parties; at the Fall Term 1832, the cause was set down for hearing, and at the August Term 1833, was, upon affidavit of the plaintiff, John D. Graham, removed to the Supreme Court. After the cause came here, Mrs. Graham died, and her husband was by an order of

the Court permitted to revive the cause as her administrator. At the June Term 1834, of the Supreme Court, the following order was passed: "The plaintiff's counsel admitting that certain exceptions taken by the defendant to the report of the Master made in the Court below, and which affect the whole report, are well founded, it is thereupon ordered by consent of the parties, that the said report be set aside, and that the cause be referred to Mr. Commissioner Freeman, to state the same accounts as are directed in the decree made in the cause below, and that he report at the next term. It is also ordered by the like consent, that the reference be without prejudice to any matters of defence set up by the defendants or either of them." Under this order the commissioner made his report, to which very many exceptions were taken by the defendant Davidson, several by the defendant Conner, and many by the plaintiff.

It is not deemed essential to state the exceptions of the different parties in detail, as the nature of those of which a particular notice is necessary will be sufficiently seen in the opinion of the Court.

By an arrangement between the counsel, the cause was heard upon the pleadings and proofs, and the exceptions argued at the same time, by

[165] *Winston* and *W. H. Haywood*, for the plaintiff;

Devereux, for the defendant Davidson; and

Badger, for the defendant Conner.

Gaston, Judge, after stating the pleadings and proceedings in the cause as above, continued as follows: Upon the hearing very little material evidence has been offered on either side with regard to the matters put in issue by the pleadings. The plaintiff has exhibited several letters received from the defendants Henry W. Conner and George L. Davidson, in answer to applications made to them by him for a settlement of the matters involved in this suit. Those of Mr. Conner are all in accordance with the spirit manifested in his answer, expressive not only of willingness but of solicitude that a settlement should be made which might render justice to his sister, and declaring his hope that Mr. Davidson would not hesitate in

complying with the plaintiff's wishes, and going into a settlement agreeably to the will of his testator. Unfortunately, Mr. Davidson pursued a different course. He refused to make any settlement—insisted that he had nothing to settle—that he had already settled in 1821, and that it was for Graham and Conner to settle and show a deficit against him.

No account is exhibited to us as having been made at the time of the alleged settlement in 1821; no evidence of any kind offered to show what was the basis of the alleged settlement, or what matters were included in it; and no receipt or discharge of any kind from John D. Graham or Henry W. Conner. The settlement with Worke is exhibited. It purports to be an account current of Robert Worke as guardian of Henry W. and Elizabeth E. Conner, on which a balance is struck in their favor of $602 76, due on the 25th July 1825, and is signed by R. Worke and Henry W. Conner. It appears from the deposition of James Graham, that after the death of Worke he was informed by Mr. Conner that he had settled his business with Worke, and wanted a judgment taken for the balance acknowledged to be due thereon: that the witness was referred to some person, as he thinks, John Mushat, one of Worke's executors, for the settlement: that the same was afterwards handed to him, as he believes, by Mr. Mushat: that upon examining it he found the balance thereon stated acknowledged [166] as due to Mr. Conner and his sister, the wife of the witness's brother John, and that thereupon, without any consultation with his brother, and so far as he is informed without his brother's knowledge, he issued a writ in the joint names of Henry W. Conner and John D. Graham and wife against the executors of Worke, in the County Court of Iredell, where the executors resided, and had judgment accordingly.

We have no hesitation in saying that the plaintiff is entitled to a full account from the defendant George L. Davidson, as guardian of his deceased wife and intestate, and of course to an account from said defendant of his administration of the estate of Charles Conner, for the purpose of ascertaining the funds which came or ought to have come to his hands as her guardian. There is no trust which can be reposed in one person over the property of another, in regard to the management whereof

a full and detailed account is more imperiously demanded, than in that which the law confides to a guardian over the estate of his ward. It does not appear that *any* account has been rendered thereof. An effort towards an estimate of the balance that might be due from Mr. Davidson has indeed been made between him and Mr. Conner, and payments were made in pursuance thereof, but to hold this loose transaction to be an account settled between the guardian and Mrs. Graham, when it is not seen that any account was stated, nor what were the matters embraced within the attempt to settle—when the guardian will not himself swear that as far as it went the same was correct, but leaves the ward to make full proof if she can that it was not correct—would be to violate, as we think, the plainest principles of equity. It is greatly to be regretted that Mr. Davidson should have been so advised, for otherwise there is little doubt but that all the matters involved in this expensive, tedious and vexatious suit might long since have been arranged, and with a greater likelihood of doing justice to the parties than is now practicable. We also hold, that the plaintiff is not prevented by the account stated between Mr. Conner and Mr. Worke from having a full account either against Davidson or Worke's executors, because of any of the matters pro-
[167] fessed to be thereby settled, if for no other reason, for this, that it is not shown that he or his wife was any party thereto. What influence that settlement may have as evidence in regard to items of which full proof cannot now be had, may be a proper subject of inquiry when considering of the exceptions. The plaintiff, upon the answer of Mr. Conner, is entitled to an account of the matters therein admitted as remaining to be settled between them.

To understand the nature and bearing of the exceptions, it is proper to advert to the manner in which the commissioner has taken the accounts reported. In the first place he has stated an account marked A, and called the executor's account, for the purpose of ascertaining what was the balance in the hands of Davidson on the 1st of January 1810, when he entered upon the exercise of his office as guardian, due to Mrs. Graham, then Miss Conner, upon her father's estate. In the next place he has stated an account marked B, between Worke and David-

son as her guardians, commencing with the 1st of January 1810, and terminating with the year 1817, in which the balance ascertained as due to her upon account A, enters as a part of her estate. The commissioner then stated an account C, between the defendant, Henry W. Conner, and the said Worke and Davidson as guardians, commencing and terminating at the same time with the account B; and having ascertained that in 1817 the said Henry had received not only what was due to him, but a part of what was due to his sister from Davidson and Worke, he commenced a new account D, between Davidson and Worke and the plaintiff's intestate, in which they are credited with the balance in their favor on the account C, and continued this account D to the day of making the report. In the account D the guardians are further credited by all their subsequent advances made to either of their wards. The account E is between the plaintiff and the defendant Henry W. Conner, in which the latter is debited with all that he has received beyond what was due to him. The final result as stated by the commissioner is, that the defendant Davidson owes to the plaintiff the sum of $4,406 97, of which the sum of $2,532 80 is principal, and that the defendant Conner [168] owes to the plaintiff the sum of $3,103 11, of which $1,240 83 is principal money.

The defendant Davidson hath taken twenty-one exceptions to the account A, and eight to the account B; the defendant Conner hath taken eleven exceptions; and the plaintiff hath filed two sets of exceptions, the first containing five, and the second, called additional exceptions, containing thirteen.

In noticing these, it is deemed advisable to dispose of the matter embraced in the 20th of Davidson's and the last of Conner's exceptions, which present in substance the same objection, that the commissioner hath not so made his report as to pursue the order of reference, or to embrace and apply to the matters arising on the pleadings, or to show upon what principles the several accounts accompanying the report have been stated. It has been seen that the reference was made by consent of the parties and without prejudice; in effect it is their reference, and as such is regarded by us. So far as this objection is founded upon the omission of the commissioner "to

set forth what amount of money or property was set apart by the will of Charles Conner for the payment of debts, and what amount was set apart for educating his children," it is overruled as immaterial. It conclusively appears upon the face of the report, that the funds thus provided by the will were more than sufficient for these purposes, and therefore an inquiry as to the *amount* of either is not *apparently* necessary for the determination of the matters arising on the pleadings. The residue of this objection, except in one particular, is unfounded in fact, for the report pursues the order of reference by stating an account of the administration of the assets of Charles Conner, what amount remained for distribution among the children and how the same was distributed, and sets forth the sums which came into the hands of Davidson and Worke as guardians, and how disbursed. The omission to state, which is the particular above excepted, the value of the property undisposed of by the will, is unimportant, for the Court holds in regard to the property referred to, that whether it be embraced in the will, or not disposed of thereby, it was alike divisible into
[169] equal shares between the son and daughter of the testator, and the commissioner hath so treated it in his report. The principles upon which the commissioner hath proceeded in stating the accounts are declared with sufficient distinctness to enable the parties and the Court to judge of their correctness, and to understand their application; and the defendants have made these principles and their application the matter of other exceptions. These therefore are overruled.

The first five exceptions of the defendant Davidson to the account A, may be properly considered together. This defendant objects to his being charged with the amount of notes returned in the inventory, with a judgment against James Kerr therein returned, amount not stated but since ascertained, with the amount of book debts also therein contained, and with the amount of certain sales set forth in the account of sales, because there was no proof that the same or the proceeds thereof came into the hands of Davidson; because there was proof that a portion was collected by Charles Harris, and because a part thereof was bad, and a part subject to set-offs. The commissioner, we think, acted correctly in so charging the

defendant. All these matters of charge were contained in inventories and accounts of sales jointly returned by Harris and Davidson, and no evidence was offered by the latter to show what part, if any, came to the hands of his deceased co-executor. From the year 1805, in which Harris died, Davidson alone acted as executor of Charles Conner. In 1809, he was appointed guardian to the plaintiff. It was his duty as guardian to secure whatever portion of Charles Conner's estate was due to her. It is proved that Harris left a good estate, and no attempt of any kind was ever made by Davidson to collect from Harris's representatives any alleged balance due from Harris to Conner's estate. Besides, Harris married the widow, and Davidson is credited for large sums of money paid in discharge of her distributive share of the estate. It is not to be presumed that such payments would have been made, if her husband held in his hands an amount sufficient to satisfy and extinguish this demand. The only proof offered that Harris received any part of the estate, is a memorandum exhibited by Davidson, in which Harris acknowledges himself accountable [170] for a number of notes, each particularly stated, amounting altogether to about $300. As for the judgment against Kerr, it was obtained at the last term of Iredell County Court preceding the testator's death; it is proved that Kerr was abundantly able to pay it, and Mr. Davidson, in his answer to a particular charge in the bill relative thereto, says only that he does not remember who collected it. Besides, Harris's vouchers for disbursements have been brought before the commissioner by Davidson, and he has had the same credited to him. As to set-offs against the debts inventoried, or as to credits because of the debtors becoming insolvent—the debts not being stated in the inventory to be desperate or doubtful—these were matters which could not be assumed by the commissioner without proof. It will be seen, in the consideration of a subsequent exception, to what extent such proof has been made. As to the sales, the accounts returned not only show, but it is proved by witnesses, that they were conducted by Davidson as well as Harris, in person. These exceptions are therefore overruled.

The sixth exception is, for that the commissioner hath charged

the defendant with the sum of $100 in the hands of the widow. The additional inventory annexed to the second account of sales, (marked E,) sets forth this sum as part of the assets of their testator with which the executors are chargeable. No doubt they took care, when paying her the amount afterwards assessed by the jury for her distributive share, to claim the said $100 as an advance *pro tanto*. This is also overruled.

The seventh exception has been withdrawn. The eighth of this series of exceptions, as well as the first exception to the account B, and the first and sixth of the defendant Conner's exceptions, depend upon the construction of the will of Charles Conner, and involve the main subject in contestation between the plaintiff and the last mentioned defendant. It is contended on his part, that the fund created by the testator for the payment of his debts and the schooling of his children, arising from the sale of his goods, the obligations due to him, and the judgment against Likely, Wardrobe & Co., and the *interest* upon the loan office certificates—subject to those charges
[171] —is by the will to be distributed, two-thirds to his son and one-third to his daughter. This construction cannot be maintained. The distribution thus directed is expressly restricted to the negroes and the hires of the negroes. The fund in question either passed to the two children equally by implication, from the application directed of its use, or was undisposed of by the will, and if undisposed of, it is equally divisible between them, because the mother takes only what was allotted to her by the jury upon her dissent, and they are his next of kin. These exceptions, therefore, must be overruled, except as to that part of the first exception to account B, which will be hereafter mentioned.

The ninth exception, that the defendant is not allowed commissions on his disbursements, is overruled, for the commissioner hath allowed five per cent. commissions to the defendant upon the amount of the estate. The tenth exception is sustained for the sum of $138 33, and the interest thereon since January 1791, wherewith the defendant has been charged for James Conner's note. This note was returned in the first inventory without any comment, but in the account of sales of 1805 (E,) there is a memorandum that the same was believed

to have been paid to the testator. The note had been due 13 years before the testator's death, was barred by the statute of limitations, and has been returned by the executor as uncollected. The residue of the exception is overruled because it is unsupported by proof.

The 11th exception depends upon the construction of that clause in the testator's will which devises to his son the land called the Greenwood farm, with its appurtenances, including "all stock" on the same. In our opinion the word stock used in connection with farm or land has a settled meaning, whereby it is restricted to the animals which are used with, supported by, or reared upon it. No farmer or planter would think of passing the crop of the *antecedent* year made upon a tract of land and gathered, or his farming utensils, by a disposition of the plantation and the stock thereon. This exception is therefore overruled.

Of the 12th exception we find no proof.

The 13th exception is because the defendant hath been [172] charged with interest without proof that the defendant used the funds. Interest, according to the usage of our Courts, follows debt as its ordinary attendant. Therein we depart from the English rule, and probably this deviation has resulted from the circumstance that in this country money never lies idle, and he who withholds from another what is his, is presumed, until the contrary appears, to have laid it out in schemes of profit. In this case however, interest is to be charged necessarily, unless we make a gift to the executor of the interest which accrued upon a fund producing interest. It has been calculated upon the notes and debts from the time they became due, and upon the sales from the expiration of the time of credit. There has been no interest account kept by the executor to show that less was in fact received. The exception is overruled.

The 14th exception is admitted to be well founded.

The 15th exception we find supported by proof as to one small item. On examining the voucher as to P. Johnston's note we find that the defendant has been credited with $4 80, when he ought to have been credited with $21 67. To the extent of this difference and the interest upon it, the exception is allowed, and as to the residue is overruled.

The 16th has been withdrawn.

The 17th exception, so far as it can be considered as applying to the commissions which the defendant claims, is unfounded, for these have been allowed upon the whole amount of the estate, whether consisting of principal or interest, which is equivalent to allowing him interest upon the commissions. As to payments properly so called, they have been credited as of the time when made, and interest calculated on large items from the very day; and with respect to expenditures consisting of a great number of small items, the commissioner hath ascertained the amount of each year, and allowed interest thereon from the middle of that year. This exception is overruled.

The 18th exception, for that the commissioner hath not allowed a credit in the account A, for the value of a horse, carriage and harness, given by the will of Charles Conner to his son, is allowed. It ought to be credited in that account [173] as though the legacy had been paid, so as to diminish the general balance thereof which is divisible between the son and the daughter. The defendant is to be credited therefor the sum of $275.

The 19th hath been withdrawn.

The 21st is, for that the commissioner hath not credited the said defendant with $440, part of the widow's share allotted to her by the jury. We shall have occasion to consider the objections made by the plaintiff to the defendant having any credit because of the share allotted to the widow, and showing wherefore we overrule them. For the reasons then to be stated we allow this exception. Very clearly the jury have charged upon the executors this sum as well as the balance of $2,138 26, which they state as remaining due "after the $440 shall have been paid."

The first exception of the defendant Davidson to the account B, hath been already in the main overruled. It is of course to be sustained, so far as may be rendered necessary in consequence of the allowance of exceptions to the account A, affecting the balance to be carried into the account B.

The second, third, fourth, and fifth exceptions will be considered together. In January 1811, the defendant Davidson delivered over to Robert Worke, notes and bonds belonging to

the infant children of Charles Conner, to the amount of $2,065 66, and suffered Worke to have the management of their property for some years thereafter. At the end of the year 1815, in which year the guardianship ceased, Worke owed to the wards a sum *far short* of the amount placed in his hands. He died insolvent, and Davidson insists that he is not liable for this deficiency. It seems to us that he is liable. He was in truth the separate guardian of the plaintiff's wife, and if he thought proper to place her money in the hands of Mr. Worke, or confide her estate to his management, he must be responsible for the insolvency or infidelity of his agent. But if he and Worke are to be considered joint-guardians, as they claimed to be, still the sum of $2,065 66 passed from his hands into those of the other guardian, and it is a settled principle that where, by the act or agreement of one trustee, money gets into the hands of his co-trustee, *both* are answerable [174] for it. These are therefore overruled.

The sixth and seventh exceptions, claiming credits beyond those allowed by the commissioner, for the board, tuition and personal expenses of Miss Conner, must be overruled, for there is no evidence to support them. The exceptions are in a great degree founded on mistake arising from the circumstance that the credits are entered in the account according to the *dates* of the *vouchers;* and these show the expenses of antecedent years, for which no credit would appear to have been allowed. In the whole they amount to a large sum, and we cannot say that in truth the expenditures were greater.

The last exception to this account on the part of the defendant Davidson is, for that he is improperly charged with $200, for the legacy of a horse, bridle and saddle, bequeathed to the testator's daughter. Upon looking at the account A, it will be seen that the value of this legacy is subtracted from the balance there stated. In other words, the defendant is charged as guardian but credited as executor for the amount. This is obviously correct.

Of the plaintiff's exceptions, the 1st and 3d of the first set, and the 4th and 6th, 11th and 12th of his second set, or additional exceptions, are provisional only, and designed to be insisted on only in the event that certain exceptions taken by the

defendants should prevail. As the latter have not been allowed, these are of course overruled.

The second exception brings to our notice a matter upon which the plaintiff is entitled to an inquiry. The interest on the funded debt was by the will to be applied to the education of the testator's children. Both were entitled to the benefit of this interest, although the principal was bequeathed to the son. It is nowhere noticed in the report or in the accounts. There ought to be a further inquiry as to the subject-matter of this exception, ascertaining what amount was received and by whom, and how applied; and who, if any one, is chargeable to the plaintiff by reason of her share thereof.

The 4th exception, as well as the 2d, 3d and 5th of the additional exceptions, are intimately connected with an
[175] exception of the defendant Conner, and will be taken notice of when that is considered.

The 5th exception is unfounded. The sum of $526 67, excepted to, is not a payment because of hires subsequent to the division. Notes to that amount, in the language of the voucher, were "taken," that is to say, were delivered over in payment after the division, but they were for hires that accrued before.

The 1st and 13th of the additional exceptions object to the defendant being credited with any part of the share of the personal estate of the testator allotted to the widow. It seems to us that, under the circumstances of this case, and as between the parties in this suit, the executor is entitled to credit for all that was so allotted. The widow, to whom the assignment was made by the jury, was the mother of the plaintiff's intestate, and of the defendant Henry W. Conner, who were alone interested in lessening that allotment; she was also one of the executors of the will, and for aught that appears to the contrary, she is yet living. The assignment, if liable to formal or even substantial objections, was made upwards of thirty years ago under the authority of a Court of competent jurisdiction, and by a jury as directed by the act of Assembly. This return gave the widow a sufficient *prima facie* warrant whereupon to exact payment, and at this day, when up to this moment there has been no complaint against the return and no complaint on

her part that payment has been withheld, a payment is to be presumed. Indeed so far as we can collect from the vouchers laid before the commissioner, not only has payment in full been established, but it appears that she received from Davidson *in addition thereto* one-third of what came to his hands on account of the Likely debt.

Moreover, in the bill the plaintiff states that the widow's distributive share has been laid off in pursuance of her dissent, and had been paid to her by the defendant. It is not alleged that its amount was excessive, or the proceedings irregular; and there is an admission that it has been paid. If after this lapse of time it is designed to impeach the validity of this assignment, Mrs. Harris ought to be made a party so that she may sustain it, and if she cannot sustain it, so that she may be made liable in the first instance for what has been improperly received under it. These exceptions are overruled. [176]

The 7th exception is overruled, because it is not shown that produce or money was used and expended in the making of a crop on the Greenwood farm in the year 1804. If this had been shown, it would then have been a material inquiry how the crop made thereon had been applied.

The 8th exception is clearly good in part. The amount of book debts is stated in the account A, at $1,609 95, whereas it should have been $1,820 75. The error was occasioned by the commissioner taking as the whole amount of debts due the testator, what is stated in the inventory as the net amount after deduction of debts owing by him. For such of these debts as have been discharged by the executors, they have been credited in the administration account. The residue of this and the 9th exception are overruled as not being sufficiently supported. The 10th exception is so far supported as to render an inquiry in relation thereto proper. It appears by a receipt of Henry W. Conner to G. L. Davidson of the 8th Dec. 1814, that the latter, as his guardian, put into his hands a receipt of Peter Epps for a note of Dunn and Caldwell, of Petersburg, for $414. This probably was on account of the Likely debt. It does not appear what was received thereupon, or by whom. The subject-matter of this exception is therefore recommitted to the commissioner for further inquiry and report.

Of the exceptions taken by the defendant Henry W. Conner, the 1st, 6th and 11th have been already disposed of.

The 2d is overruled, for the matter excepted to seems fully supported by the evidence.

The 3d, 4th and 5th exceptions, as well as the 2d, 3d and 5th of the plaintiff's second series of exceptions, are necessarily connected together. The commissioner having ascertained by the result of the account B, that there was due unto the plaintiff, because of the estate of his intestate which had come into the hands of her guardians, the sum of $7,510 08, of which $3,773 63 was principal money and $3,736 45 interest thereon to the 1st June 1837, proceeded in the account D to as-
[177] certain how far this debt had been diminished by the guardians, through payments made to the defendant Henry W. Conner. The result of the account D, was to lessen the balance of the principal debt as first found from $3,773 63 to $2,532 80, and that of interest from $3,736 45 to $1,874 17, and therefore in the account E, between the plaintiff and the defendant Conner, the latter is debited with the difference between the two first and the two last amounts, or with $1,240 83 principal money and $1,862 28 interest. If the account D be correct, and the reduction of the balance thereon stated be the result simply of payments made to Mr. Conner, the debit in the account E excepted to is proper. But we think, upon the evidence to which the report refers, both these matters are, to say the least, doubtful. In the account D the guardians are credited, and of course in the account E, Henry W. Conner is, by reason thereof, charged, with the amount of the judgment obtained against Worke's executors. It is admitted on all hands that the estate of Worke is insolvent. Whether that judgment has been paid or not, and if so to whom, or if not paid, whether it is good for the amount, are material inquiries in determining whether Mr. Davidson can claim credit on account of it, and so charge his co-defendant. Again, there are credits in the account D for the whole amount of the two notes given by Davidson in June 1821 to Graham and Conner, when the evidence is that these notes were reduced by deducting therefrom a note or due bill of Conner's for $200, and interest, overlooked when these notes were given, and we understand

this to be the same that is credited before in the account D in 1816, as "cash (G. L. D.) $200." Besides, though it be proper in discharge of Davidson to credit him with the whole amount paid upon the two notes in 1821, yet Conner ought not to be charged with more than *he* received, and ought therefore to be credited in account with Graham for the amount which was paid the latter by Davidson. We direct therefore that the subject-matter of these exceptions, that is, the ascertainment of the amount received by Henry W. Conner from Davidson or Worke, or either of them, or of the estate of Worke above the amount due to him from them, be recommit- [178] ted to the commissioner for further inquiry and report.

The 7th exception is, for that the commissioner hath not allowed to this defendant, nor charged to the plaintiff, the value of the horse, carriage and harness bequeathed to this defendant by the testator. We have already disposed of this exception, so far as it seeks to charge the plaintiff in account with the executors with the amount of this legacy, in our judgment upon the 18th exception of the executor, Davidson. But this defendant is entitled to a credit for this legacy in his account C with the guardians; and therefore this is allowed as an exception to that account.

The 8th exception is overruled because not supported by proofs. The 9th exception is overruled also. The commissioner hath actually made the settlement between R. Worke and the defendant the basis of the account of Worke's guardianship. He hath not rejected a single credit therein stated, nor hath he added a debit thereto but upon clear proof. This renders it unnecessary to consider whether the exception, if founded in fact, would have been valid.

The 10th is a general exception, and from what now appears must necessarily be overruled.

The result upon the exceptions, therefore, is, that the 14th, 18th and 21st of the defendant Davidson's exceptions to the account A, are allowed in full, and that the 10th and 15th of his exceptions to said account, and his 1st exception to the account B, are allowed so far as is mentioned in this opinion, and overruled as to the residue, and that the other exceptions of said defendant are wholly overruled; that the 7th of the defendant

Conner's exceptions is allowed to the account C; that the 8th of the additional exceptions taken by the plaintiff is allowed so far as is mentioned in this opinion, and overruled as to the residue; that the matters embraced within the 2d and 4th of the plaintiff's first set of exceptions, and within the 2d, 3d, 5th and 10th of his additional exceptions, and also those matters which are embraced within the 3d, 4th and 5th of the defendant Conner's exceptions, are referred to the commissioner to make further inquiry and report thereon, and all the other exceptions taken by the plaintiff and the last named defendant are
[179] overruled, and that the report is to be recommitted to the said commissioner, so that the accounts may be remodeled according to the judgment given on the exceptions, and according to his finding upon the matters whereof the further inquiry has been directed.

PER CURIAM. Direct accordingly.

NOTE.—A receipt under seal will not avail as a defence to a bill brought to have an account against a guardian, by his former wards, on the ground of a mistake which the defendant admits. *Felton* v. *Long*, 8 Ired. Eq. Rep. 224. See also *Boyett* v. *Hurst*, 1 Jones' Eq. Rep. 166. In a proceeding under the act of 1844, ch. 41, (Revised Code, ch. 54, sec. 14, 15, 16 and 17,) by the Attorney General, or a solicitor, against a defaulting guardian, the wards are not required to be made parties, and the decree thereon will not be conclusive against the wards upon a bill by them against such guardian for an account. *Becton* v. *Becton*, 3 Jones' Eq. Rep. 419.

Upon the question of the responsibility of joint executors for the acts of each other, see *Worth* v. *McAden*, 1 Dev. & Bat. Eq. Rep. 199, and the note to that case in the second edition. See also *Williams* v. *Maitland*, 1 Ired. Eq. Rep. 92; *Kerr* v. *Kirkpatrick*, 8 Ired. Eq. Rep. 137; *Ochiltree* v. *Wright*, 1 Dev. & Bat. Eq. Rep. 336, and the note thereto in the second edition.

Though an executor is not responsible for a debt which he returns in his inventory as "desperate," unless the creditor can prove that the debtor was solvent and able to pay, yet the creditor is not bound to show that the debt was due to the testator. 3 Ired. Rep. 450.

Upon the question of commissions, see *Peyton* v. *Smith*, post 325; *Whitted* v. *Webb*, post 442; *Walton* v. *Avery*, post 405. In a suit by legatees and distributees against an executor or administrator, the Superior court has the power to review the decision of the County court in the allowance of commissions, whether such allowance is alleged to have been made upon a wrong principle, or is inadequate or excessive. *Shepard* v. *Parker*, 13 Ired. Rep. 103.

As to the charge of interest against an executor or administrator, see *Peyton* v. *Smith*, post 325; *Spruill* v. *Cannon*, post 400; *Walton* v. *Avery*, post 405. The court will not charge an administrator with interest on money *bona fide* collect-

ed, and kept for the use of those entitled to it, unless there be plain proof of misconduct in such collection and custody. *Hester* v. *Hester*, 3 Ired. Eq. Rep. 9.

The acts of 1784 and 1791, relating to the dissent of widows to the wills of their husbands, (1 Rev. Stat., ch. 121, sec. 12 and 13,) are contained substantially in the Revised Code, ch. 118, sec. 12. A widow, who dissents, is entitled to the same share of her husband's estate, as in case of his intestacy; and she is entitled to an account of the estate, as of *the time of settlement*, and not of the death of the testator. *Hunter* v. *Husted*, Busb. Eq. Rep. 97.

JOHN B. JONES, Adm. of JOHN MARDSDEN, *v.* GABRIEL SHERRARD et al.

In a partition under the act of 1787, 1 Rev. Stat. ch. 85, sec. 1, the land is the debtor, and the sole debtor, for the charge of money made upon it for equality of partition; and if a note be given by the owner of the land to secure such charge, the land will still continue to be the primary debtor, and the note be regarded as a collateral security only.

Where there is a charge for equality of partition upon the wife's land, the husband or his surety will, if he has given a note for the sum charged, be relieved in equity by having the money raised out of the land to discharge the note, or the judgment which may have been obtained at law upon it, or to be reimbursed if he has paid it.

If the land of the wife, upon which there is such a charge, has, upon her death, descended to the persons to whom the money is payable, the husband, if he be not tenant by the curtesy, will be relieved in equity from the payment of a note given by him to secure the sum charged; but if, in such case, he be tenant by the curtesy of the land, the note will stand as a security only for the amount of the value of his life estate, and the interest accruing after his wife's death upon a capital composed of such value added to the interest accumulated during the wife's life, provided the annual interest upon such capital be not more than the annual profits of the land.

It is a general principle, where a sum of money is due in respect of land and there is no contract of the terre-tenant, that the land alone is liable.

The terre-tenant of land, liable to encumbrance, must take care that such encumbrance does not accumulate to the injury of those who are to come after him; but in doing this, he is not bound to give any thing for the relief of the land, more than the rents, or actual annual value of the premises during his time.

A tenant by the curtesy must pay the whole interest during his life, but the arrear of interest which accrued during the life of the wife, is not chargeable to the husband, as a distinct item of interest after her death. During the coverture, the husband is not in of any estate of his own; but he and she are in as of the estate of the wife, the tenant in fee; and the owner of the fee may let the interest run in arrear at pleasure, and the whole will remain a charge on the estate, against which the heir has no equity to be relieved.

The proportion which a life estate ought to pay of a charge upon land, was

formerly regarded as one-third of the amount; but that rule has more recently been disallowed; and it is now usually referred to the master to inquire what proportion of the capital the life estate ought to pay, regard being had to the rate and amount of interest, the annual value of the land, and the age, state of health, and habits of the tenant for life, estimated upon the principle of life annuities.

Burnet Bryan, Simpson Bryan, Epsey Bryan, Zilpha Bryan, Sally Bryan, William Bryan, and Margaret, then the wife of Miles Radford, were the children and heirs at law of Robert Bryan, deceased; from whom descended to them a tract of land situated in Wayne County. In 1824, upon the petition of the parties, partition of the land was made between them by a decree of the County Court; and thereby the dividend allotted to Radford and wife was charged with the payment of several sums of money to some of the other parties for equality of partition: that is to say, to Sally $101; to William $146; and to Zilpha $101. Those three persons were infants; and Gabriel Sherrard was their guardian. On the 19th of October 1827, he [180] took a promissory note from Miles Radford and the plaintiff Mardsden, payable to himself as guardian, for the sum of $405 59, as the aggregate of principal and interest then due on that account to his wards. As a counter-security to the plaintiff, Radford and wife executed a mortgage in fee of the land allotted to them, on the 17th of January 1828, which, however, was defeated as to Mrs. Radford by her death a short time afterwards, without having been privily examined. Radford and wife occupied the land during her life, and he has continued to do so ever since. There was issue of the marriage, but not living at the death of Mrs. Radford; and her heirs at law were her six brothers and sisters before named. Radford had little or no estate but that for his life in this land, as tenant by the curtesy; and Mr. Sherrard thought it his duty to put the note in suit against the surety, Mardsden, and claimed the whole principal and interest from him for his three wards.

Thereupon Mardsden filed this bill against Sherrard, his wards and the other heirs of Mrs. Radford, and against Radford, stating the foregoing facts, and that it was not the intention of any of the parties to discharge the land by substituting the personal responsibility of Radford and Mardsden, and that the land

was not discharged from the said sums, but remained liable therefor, and the note was only additional and collateral security for the same: and prayed to be relieved against the note, and that the land might be declared to be the primary fund for the satisfaction of the sums for which the note was given: and further prayed that the mortgage might be foreclosed by a sale of Radford's life-estate, and the proceeds applied to discharge whatever sum the plaintiff might be liable for on the note.

The answer of Radford admitted the statements of the bill and submitted to any decree.

The answer of Sherrard and of the heirs of Mrs. Radford submitted that there was a lien on the land for the sums assessed, to which the persons in whose favor those sums were charged might resort at their election, but were not compelled to do so; and admitting that it was not intended to extinguish the real security by taking the note, the answer yet insisted, that the note was a voluntary collateral security [181] given by Radford which the guardian is at liberty to enforce, as being most to the advantage of his wards. The answer also stated the annual value of Mrs. Radford's dividend to be $75; and on that ground claims that the note might be enforced for the whole principal and interest.

Henry, for the plaintiff.

Devereux, for the defendants.

RUFFIN, Chief Justice, after having stated the case as above, proceeded as follows: The principal questions discussed in this case are, whether the money to be paid to the owner of a dividend of inferior value, upon partition, is the personal debt of the owner of the more valuable dividend, or is an encumbrance fixed on the land, and on the land alone? And if the latter, whether the land is yet primarily liable, notwithstanding the events subsequent to the partition?

The opinion delivered as that of the majority of the Court in the case of *Wynne* v. *Tunstall*, 1 Dev. Eq. Rep. 23—however indistinct as to the precise grounds on which the decree was to be based—is explicit as to the meaning of the act of 1787, 1 Rev. Stat. ch. 85, sec. 1, upon the first of the foregoing points.

The Court held the charge directed by the act to be "a legal charge upon the land," which rendered a knowledge of its existence by a purchaser immaterial; and also that by such a charge "the land was not a security only for the money, but was itself the debtor." It is true, the decision was not unanimous; and Judge HENDERSON dissented without giving his reasons. It is nearly certain, however, that he differed not on this point, but on others on which the opinion must be admitted to be unsatisfactory, and the decree, in some respects, unquestionably erroneous. Besides the inquiry, whether the land was the debtor for the money charged, there were the other questions: first, whether the money charged was realty or personalty, as between the husband and wife, and as between them and the owner of the land from which the money was to be raised: and secondly, whether Tunstall was a purchaser without notice; and whether, as such, he would be protected. Now it cannot be denied that the proposition there contended [182] for on behalf of the defendant has great force in it, namely, that an actual conversion of realty into money by judicial sale or sentence is, legally and equitably, a conversion out and out into personalty, unless there be a provision by statute, or a reservation by the decree or judgment, to the contrary. Many reasons are readily conceivable, why the legislature should not impart to small sums of money in this situation, the character of land; and there is no plain intent to do so expressed in the act. Judge HENDERSON's difficulty may have been on this head. But, besides, the decree proceeds upon a declaration in it that Tunstall had notice, after the opinion had declined entering into that inquiry, upon the ground that it was immaterial. Above all, after holding the money to be land, and to be charged on the land as the debtor, the decree gives authority to the plaintiffs, at their election, to raise the money from the land or from the defendant and his sureties personally; and further directs it to be raised immediately and settled for the benefit of the wife, although Tunstall had the undoubted right to Wynne's interest as tenant by the curtesy, or at least during the lives of himself and his wife. It is thus obvious, that Judge HENDERSON might not have concurred in that opinion for other reasons than a doubt whether a dividend of

the land was the debtor for the money charged on it for equality. His own opinion in *Gregory* v. *Hooker*, 1 Hawks, 394, shows that he entertained no such doubt; for he there held—whether rightly or not, is not a subject of consideration now—that without any statute, money payable upon a division of slaves, out of one share to equalize the division, was secured upon the property. However open to observation, therefore, *Wynne* v. *Tunstall* may be in other respects, its authority cannot, we think, be denied on the question now under discussion, on which it uses the unequivocal language before quoted.

But without that guide, the language of the act of 1787, the provisions of other acts *in pari materia*, and the natural equity and reasonableness of the thing, lead us to the conclusion that the money is a legal and adhering charge on the lands, and constitutes a debt of the realty exclusively.

The commissioners are empowered to *charge* the more [183] valuable *dividend* with such sum as may be necessary to render the division equal; to be returned, with a description of the different parcels of land, lots or houses. Those words *per se* seem sufficient to make the land the debtor. It is to be remembered, that the debt is one of legal creation and regulation, entirely independent of any contract of the parties. Ordinarily such a debt is that of the realty and not of the terre-tenant personally. An instance is the descent of mortgaged premises to the heir, who enters into no covenant. Another is a judgment against the ancestor or statute merchant acknowledged; on which the land is subjected by *scieri facias* to the heir and terre-tenant, on which there can be no judgment against those parties personally, but only for execution against the land descended from the debtor. In reference to the case before us, there is a plain propriety and equity, that a part owner of the land, who does not get a full share of it, but is compelled by law to take money in lieu of the deficit of land, should have the most permanent security of the realty, and that security an absolute one. The personal responsibility of the party to whom the land is allotted, could not be deemed adequate; especially when we advert to the circumstance that the payment is deferred for a year, and that in that time the land might be disposed of, and the person out of the jurisdic-

tion. Nor should what is called an equitable lien be much more efficient, as a purchase without notice would free the estate from it. There seem therefore sufficient reasons why the legislature should have meant to bind the land conclusively; and we are satisfied that in that sense is to be understood the charge on the land given by the act.

This construction is confirmed by the subsequent and supplemental acts. That of 1801, Rev. ch. 588, (see 1 Rev. Stat. c. 85, sec. 34,) is, in its preamble, demonstrative that, as then understood in the legislature, the sum charged was not the personal debt of the infant, nor payable by his guardian out of any other property of the infant, but only out of the profits of the land. To avoid the necessity of a sale of the land itself, which would often arise from that state of the law, the act enlarges the time for payment until the infant's full age;
[184] and in the mean time authorizes and requires the guardian to make payment out of any assets of his ward, upon pain, in case of neglect, of answering the interest out of the guardian's own pocket.

The act of 1831, 1 Rev. Stat. ch. 85, sec. 12, 13, 14, for partition of lands in this and other States, also uses the language of the act of 1787, that money may be charged on the more valuable dividend to be paid to the tenant in severalty of one less valuable; and then adds in express terms, "and the sum shall be a charge *on the land* into whose hands soever it may come, although it may be taken without notice." The same principle is thus seen to run throughout the statutes; which fix the debt on the land, and subject it to sale under *venditioni exponas* against one who was party to the partition, or against his alienee if made a party by *scieri facias*, as in the other cases before alluded to.

It nearly follows from holding the land a debtor, that it is the sole debtor. It is a general principle, where a sum of money is due in respect of land, and there is no contract of the terre-tenant, that the land alone is liable. Some examples have been already given. A rent charge granted for equality of partition is another. Co. Lit. 169; 1 Thomas Coke 522, note. Of the same character seems to be the encumbrance created by our statutes. There is no stipulation by the party to make the

debt his own. While the one may justly claim the land for his debtor, as being generally the best security, the other may with equal justice require the former to be confined to the land, and not to charge him personally for the money exacted by law, for land imposed on him without his consent. The act provides affirmatively that the land shall be liable. It is silent as to any judgment against the person except as to the costs. If a personal liability had been intended, a clear provision to that end would not have been omitted. As a security for the money, a personal responsibility, instead of the liability of the land, is inadequate; and in addition to the liability of the land could not be necessary or right. A whole dividend must be supposed a sufficient security for a sum of money assessed on it, to reduce it to an equality with the other dividend. In cases in which it could be otherwise, the party entitled to the money ought to bear the loss. The land can never [185] prove a deficient security unless from the act of God, an unforseen accident, or fall of prices. In such cases it is hard enough upon the one party to have his own share of the land taken for the satisfaction of the sum assessed on it for a co-tenant, without being called on to make good a deficiency, the effect of an earthquake, a fire, or of national pecuniary distress. By buying the land for the money charged on it, the one party may get the whole share of the two in the realty. It is against reason and conscience to go beyond that, and endeavor to take also the other estate of the person to whom it was once supposed the more valuable dividend had been assigned; but which, in the event, proves to be in fact the less valuable.

Besides, the interests in estates held in common are not necessarily present interests; but there may, as to a particular share, be a life estate in one, with a remainder or reversion in fee in another. In such a case how could the personal judgment be rendered—for what proportions and when payable?

The case of husband and wife now before us, must also have been within the contemplation of the legislature, who could not have overlooked the danger to her and the injustice to him of charging them personally by judgment in partition for this money as for a debt of the wife. The wife's inheritance is her separate estate; and in respect to it, she and her husband are to

many purposes regarded, even at law, as distinct persons. Lord Camden, indeed, uses the strong language, that in a Court of Equity, in respect of money raised on the wife's land for the husband, they are looked upon as divorced *pro hac vice*. So it must upon principle also be *quoad* money paid by the husband in respect of burdens thrown by the law on the land of his wife, without his concurrence. It is very right, that each should be chargeable with the proportions which, upon settled principles, they respectively, as the terre-tenants, from time to time ought to pay in respect to the value of their several interests. But it would be contrary equally to legal analogies and natural justice to make the husband, by compulsion, the purchaser of inheritances for his wife and her heirs. On the other hand,
[186] there is a policy in relieving the husband by holding the land liable before him, and so subject to reimburse to him, money advanced upon an encumbrance on it; as otherwise, it must be expected he would suffer the wife's land to be sold in every case for owelty of partition. It is true that he may so act, though the land be the primary fund, by refusing to make an advance of the money. But there will be less, and indeed little danger of that, if it be the husband's privilege, after answering the encumbrance, to keep it on foot for reimbursement at his death, either by the surviving wife or her heirs. It is, therefore, the true interest of the wife and of her heirs, as well as of the husband, that the debt should charge the land primarily.

The opinion of the Court also is, that the land continues to be the primary debtor, at least for the principal money and future interest. The giving of the note did not exonerate the land. If Radford, instead of his wife, had been the owner, giving a note merely would not have that effect; for the note is looked on as collateral security only, and the makers as sureties for the land. *Matheson* v. *Hardwicke*, 2 Pr. Wms. 665, note; *Basset* v. *Percival*, 1 Cox. C. C. 268; *Billinghurst* v. *Walker*, 2 Bro. C. C. 604. It is much more clearly so, when the husband gives his note for the debt of his wife's land; for it is difficult to suppose he intended to take the debt on himself as a gift to his wife and her heirs. The *onus* is therefore on those who allege the intention to give, and a plain indication

of such intention ought to be very clearly shown. Although in such cases the creditor may proceed at law against the husband, yet the latter will be relieved in equity by having the money raised out of the land, to discharge the judgment at law, or to reimburse the husband if he has already advanced the money. *Baggot* v. *Oughton*, 1 Pr. Wms. 346; *Kinnoul* v. *Money*, 3 Bro. C. C. 206; better reported in 3 Swans, 202; *Pitt* v. *Pitt*, 1 Turn. 183.

It is not suggested by either party that the inheritance here is not of value sufficient to satisfy the whole money charged on it; and of course it is good for all that the note of the husband covers. In this particular case too, the admission of the answer is, that neither party intended to discharge the land: the heirs of the wife contending only, that they have a [187] right to raise the money on the note, as a subsisting collateral security, although the charge on the land be merged by reason that the land has come in part to those who are entitled to the charge. This would be true if the two securities were independent of each other; for the loss of one security could not impair the other. But here the one is dependent upon the other. The land is the principal debtor, and the husband its surety; and if the creditor cannot raise the money, or if it be vain for him to raise the money from the principal, then the surety is discharged also. Here, it would be idle to enforce the note, since out of the land the heirs would be compelled immediately to restore the money. They can, therefore, only use the note as a security for such sum as their estate in the land would not be bound for to Radford, for which he ought personally to answer; and to that extent the note must be upheld, as a valid and independent security.

What, then, is the extent of Radford's personal liability in this case? In the first place it is to be observed, that the terretenant of land, liable to encumbrance, must take care that such encumbrance does not accumulate to the injury of those who are to come after him. But then, in doing this, he is not bound to give any thing for the relief of the land but what is derived from the land. Therefore, one, who is liable in respect of the occupation of land, cannot be called on for more than the rents or actual annual value of the premises during his time. To

that extent, it is clear, a tenant for life must keep down the interest on encumbrances, and the reversioner may file a bill to make the rents amenable, and a receiver will be put upon the tenant for that purpose. *Penrhyn* v. *Hughes*, 5 Ves. 106. A dowress, for example, redeeming a mortgage, must allow the heir one-third of the interest; and a tenant by the curtesy must pay the whole interest. *Banks* v. *Sutton*, 2 Pr. Wms. 716; *Monksford* v. *Benbury*, 2 Bro. C. C. Belt's ed.; *Corbett* v. *Barker*, 3 Anstr. 759. But the arrear of interest which accrued during the life of the wife, is not chargeable to the husband as a distinct item of interest after her death. During the coverture, the husband is not in of any estate of his own; but
[188] he and she are in as of the estate of the wife, the tenant in fee. Now, the owner of the fee may let the interest run in arrear at pleasure, and the whole will remain a charge on the estate; against which the heir has no equity to be relieved. Hence, the husband of a mortgager in fee is not obliged to keep down the interest during their joint lives. How then is that arrear of interest to be disposed of? It was held by the House of Lords in *Ruscombe* v. *Hare*, 6 Dow. P. C. 21, upon the opinion of Lord Eldon, that such arrear of interest must, upon the death of the wife, be turned into principal, so as to make the original principal and that interest together, the capital, on which the husband as tenant by the curtesy must keep down the interest. There seems, indeed, to be no other mode of dealing with arrear of interest, although it violates the general rule that interest shall not be paid on interest.

There must, therefore, be an inquiry as to the sums due for principal and interest at the death of Mrs. Radford; and Radford and the plaintiff declared liable for the interest since accrued thereon; provided the annual profits of the land be found equal thereto, as to which there must also be an inquiry.

Of course Radford and the plaintiff will be liable for future interest up to the death of the former, unless they will surrender the life estate; in which case the other parties must settle the matter between themselves; or unless some of the parties require the proportion of the principal money to be ascertained, for which the life estate and the reversion would be respectively liable, if the whole debt were to be actually raised. The credi-

tor may insist on calling in the debt; and generally, either the tenant for life or the remainder-man may be unwilling to have the encumbrance kept out-standing; and in either case, the party has, ordinarily, a right to a sale to raise the money. In case of a sale of the whole estate, what remains, after discharging that part of the encumbrance for which the land was liable, would be invested, and the interest paid to the tenant for life. But as the charge and a part of the reversion have here come to the same hands, it would be unreasonable to sell the land out and out. The encumbrance, so far as respects the plaintiff and Radford, is already discharged [189] to the extent to which the reversion is liable; and between the heirs themselves, being all defendants, the Court cannot decree in this suit. The encumbrance is, therefore, substantially subsisting so far only as the life estate is liable, or the plaintiff and Radford responsible in respect of the life estate. On those parties or that estate ought therefore to be assessed a due proportion of the debt.

Formerly, that was rated at one-third, and the reversion in fee at two-thirds, as a proper average by way of general rule. *Ballet* v. *Spranger*, Pr. Ch. 62; *Verney* v. *Verney*, 1 Ves. 428, Amb. 88. But the payment of a gross sum, or any arbitrary proportion, must be unjust in many cases; and therefore that rule has more recently been disallowed. It is now usually referred to the master to inquire what proportion of the capital the life estate ought to pay, regard being had to the rate and amount of interest, the annual value of the land, and the age, state of health and habits of the tenant for life, estimated upon the principle of life annuities. *Penrhyn* v. *Hughes*, 5 Ves. 106; *Allen* v. *Backhouse*, 2 Ves. and Bea. 70; *Neimeewicz* v. *Gahn*, 3 Paige's Rep. 652.

There must accordingly be a reference of that kind here, unless the parties should make arrangements that may render the inquiry unnecessary. Such an arrangement is deemed probable, since neither party has made any specific motion on this part of the case; and the heirs of Mrs. Radford ought to be willing to accept a surrender of the life estate and give up future interest, as they say the annual value is greater than the interest, while the other parties ought to be willing to make

such surrender, as they say the interest exceeds the income. But after the opinions here declared, should there still be no arrangement between the parties, then, for the sum that may be ascertained as the just proportion of the life estate, that estate must be sold. If it bring less than the sum, the creditors must of course lose the difference, as the highest bid is the best criterion of value, and they can look only to the land for the principal money. If it bring more, the surplus will go to the indemnity of the plaintiff, as mortgagee, for his liability or payment of interest heretofore accrued; and any thing
[190] over will belong to Radford, as tenant for life and mortgager. This is not a case for costs to either party, up to this point in it.

PER CURIAM. Decree accordingly.

NOTE.—The acts of 1787, 1801 and 1831, (Rev. Stat., ch. 85, sec. 1, 3, 4, 12, 13 and 14,) are contained in the Revised Code, ch. 82, sec. 1, 3, 4, 10, 12. When a partition is made, under the statute, of lands held by tenants in common, the money which is charged upon any lot for equality, is a charge upon the land itself, and follows it, into whosesoever hands it goes, and there is no statutory limitation as a bar to the recovery of the money so assessed. *Sutton* v. *Edwards*, 5 Ired. Eq. Rep. 425.

As to the mode of estimating the relative value of a life estate and a remainder or reversion in real property, see *Atkins* v. *Kron*, 8 Ired. Eq. Rep. 1. Every case must depend upon its own peculiar circumstances, to be weighed and adjudged of, on a reference to the clerk or some other commissioner; and if exceptions be taken to the report, the court will look only to the evidence produced before the commissioner, and if not satisfied, will refer the case back for further proof.

ABNER LAMB et Uxor *v.* SAMUEL TROGDEN et al.

Where a vendor, in answer to an inquiry of his vendee how he would have the purchase-money sent, whether by mail or private hand, replied that he would leave it to the "better judgment" of the vendee, *it was held*, that the money, if sent by mail, was at the risk of the vendor.

Money sent by mail and taken out of the post office to which it was directed, by one who had been requested by the party to whom it was sent to take out his letters, will, in a contest between him and his correspondent, be considered as having been received, though the person who took it from the office embezzled it.

If, upon a bill for an account, an agreement be set up by the defendant as a bar

to the account, the plaintiff cannot impeach the agreement as unreasonable, and one not proper to be executed, without filing a supplemental bill and distinctly putting its fairness in issue.

The complainants filed their bill in 1834, therein charging, that Samuel Trogden the elder died in the year 1831, intestate; that administration on his estate was granted to the defendant Samuel Trogden; that the personal estate of the intestate, after payment of debts and expenses of administration, was distributable between his widow and eight children, of which children the female complainant was one, and the defendant Samuel another; that the said defendant had accounted with and paid over unto the others entitled to distributive shares, either the whole or a part of their just dues, but had not accounted with the complainants for their part. The bill prayed for an account from the said defendant as administrator, and a payment of what should thereon be found due unto the complainants, and for process against him and the other persons interested in the distribution of the intestate's estate. The defendant Samuel Trogden set forth in his answer, that an actual division was made of the slaves of the deceased, the only specific personal property of his intestate, among the widow and next of kin, in which division the negro slave Miles, valued at $300, was drawn by the complainants, and they charged with the payment of $21 11, because of [191] the excess of value beyond their dividend in said property; and that the complainants received this negro under said division, and placed him in the hands of the defendant as their agent; that the complainants were also entitled to receive from him the sum of $82 69, on account of their distributive share, and had a small piece of poor land which had descended to the female complainant from her father; that the complainants resided in Illinois; that the negro slave could not be carried into that State, and the complainants being desirous of disposing of all their interest in the above property, the plaintiff Abner proposed to the defendant to sell to him the whole thereof for the sum of $400, which proposition the defendant accepted, and in execution of this agreement, paid the said sum in full, and in this manner settled with the plaintiffs and discharged all their claims against him. The defendant further stated that

the plaintiff Abner returned to this State in the year 1834, and alleging that the money aforesaid had not been paid, insisted that the said agreement had not been executed by the defendant, and filed this bill.

As the other defendants were but formal parties, it is unnecessary to state their answers. There was a general replication to the answer of the defendant Samuel Trogden, and the parties proceeded to their proofs. From these it appeared that the division of the slaves was made on the 26th of May 1832, and Miles allotted to the plaintiffs at the price and subject to the charge stated in the defendant's answer, and was actually received by them. On the 2d March 1833, the plaintiff, Abner Lamb, caused to be written a letter dated of that day, in Edgar County, Illinois, and postmarked "Paris, Illinois, March 10," addressed to the defendant, in which he stated that he was informed that Miles was in great distress to know what the plaintiff meant to do with him, that if he could get $300 in good lawful money of the United States for Miles, he would take it, provided the money was sent by the first of November—"or," he adds, "otherwise I will make a lumping settlement with you; if you will send me $400 by the time above stated in lawful money of the United States, I will give you a full receipt and a deed to my share of the land, by your sending me
[192] a plat of said land, and if my offer is to be complied with in part or in the whole, I want to know it by the 15th of July next." In answer to this the defendant caused a letter to be written on the 15th July, directed to the plaintiff at Edgar County post office, Illinois, in which he thus noticed the proposition: "I understand your proposition to be this, that for the sum of $400, you will give me a full receipt as a distributee, also a bill of sale for Miles and a deed for your part of my father's land. I am willing to accept your proposition and give you the sum of $400, which I will send you by the time specified in your letter. In the mean time I want you to answer this letter immediately, and let me know if I understand your letter correctly. Let me know *how you* would have the money sent, whether *by mail*, or *by hand*." To this there came a letter in reply admitted to have been written by authority of the plaintiff Abner, dated Paris, Illinois, August 3d 1833,

in which it was remarked as follows: "I perceive you understand me perfectly as respects my wife's part of her father's estate. As soon as I shall have received the $400 as consideration as stated, I will convey all of said estate as may be requisite and legal. As respects the sending of the $400, whether by mail or private hand, *that* I will leave to your better judgment. All I ask is the $400 in specie or in the United States paper, as no other bank paper will go in the office here. As to the time I wish to have the $400 here, you can refer to the letter I sent you on the subject. I think it was on the first of November." On the 25th of October, the defendant forwarded by mail a letter addressed to the plaintiff at Paris, Illinois, containing the right hand halves of four U. S. bank notes of $100 each; and the receipt of these was acknowledged in the plaintiff's name by a letter, dated November 25th 1833, postmarked "Paris, Illinois, December 8th 1833," and received in regular course of the mail, directing the defendant to forward the remaining halves in the same manner; and thereupon without delay the remaining halves were forwarded accordingly. It seemed that neither of the parties was very conversant with business, and that all their correspondence was carried on by the aid of their friends. The plaintiff denied that he ever received the notes, and denied that the letter purporting to be his, dated the 25th November, was written by his [193] authority.

Mendenhall and *Winston*, for the plaintiffs.

No counsel appeared for the defendants in this Court.

Gaston, Judge, after stating the case as above, proceeded: The controversy between the plaintiffs and the defendant Samuel Trogden depends upon the agreement of sale and payment therefor set up in the defendant's answer.

We do not deem it necessary to analyse minutely the respective depositions which have been taken. We are satisfied that the letter of the 25th of November was not written with the plaintiff's knowledge, and that the money did not come into *his hands*, but we are also fully satisfied that the notes reached the post office of Paris; that the letters containing them were

taken out of the office by one Hugh M. Elder, a neighbor of the plaintiff, and a man then sustaining a fair character, who had been requested by the plaintiff to take his letters out of the post office, and that the said Elder forged the letter of the 25th of November, and applied the notes so transmitted to his own use. Upon these facts, it seems to us, that the loss of these notes must fall on the plaintiff, for two reasons. The first is, for that his letter of the 3d of August, in answer to the application in the defendant's letter of the 15th of July, to know *how* he wished the money sent, whether by mail or by a private hand, amounted to a direction to the defendant to send it by mail if in his judgment that mode was preferable. If the plaintiff intended that the risk of thus transmitting the money should be the risk of the defendant, he was bound in good faith to say so explicitly, and not leave it to the defendant's discretion as a prudent agent. And secondly, the loss must be his, for the money did come into the hands of one who for this purpose must be regarded as the agent of the plaintiff. It has been attempted to show that the defendant well understood that he was to incur the hazard of this mode of remittance, because, since the pending of this suit, he exerted himself by an agent to secure payment from Elder, and obtained a note payable to himself for the full amount so embezzled by Elder, which
[194] note is now in suit. But the testimony clearly establishes that the agent acted as well by the plaintiff's direction as by that of the defendant, and for the benefit of the person, whoever it might be, on whom the loss might be thrown. And we find in the record an express agreement that "the proceedings to collect the debt from Hugh M. Elder shall not prejudice either party."

It has been insisted for the plaintiffs, that if the $400 are to be considered as having been paid by the defendant upon this agreement, they are nevertheless entitled to an account in order to ascertain whether the agreement was reasonable and one proper to be executed. We do not think so. The bill has been filed for an account as though no agreement had been made, much less executed; not to be relieved against it. If the plaintiffs intended to impeach the agreement, but were not aware when their bill was filed that it would have been insisted upon

by the defendant, they should have filed a supplemental bill and distinctly put its fairness in issue. There is no apparent unfairness in the transaction, and supposing it fair, it would be impracticable to ascertain how much of the $400 was paid on account of the negro and land which were the legal property of the plaintiffs, and how much on account of their distributive share. The testimony on both sides has been directed to the controversy between the parties whether the agreement has been in fact executed or not. It has been executed as to the defendant, and neither the frame of the bill nor the proofs will warrant us in setting it aside against him.

In our opinion the bill must be dismissed; but we do not think, under the circumstances of the case, that the plaintiffs should be mulcted with costs—except the costs of the formal defendants.

PER CURIAM. Bill dismissed.

NOTE.—In the case of *Barnawell* v. *Threadgill*, 3 Jones' Eq. Rep. 50, it will be seen that the plaintiffs, by a supplemental bill, impeached the alleged compromise of the matters which formed the groundwork of the original suit.

WILLIAM PARKER, by his next friend, *v.* JOSIAH VICK. [195]

Evidence will not be received to show a parol agreement contradictory to, or varying from, a written agreement made at the same time, when no reason is assigned why the former was not incorporated into the latter.

Where a deed of gift of slaves was made, and the donee at the same time executed to the donor a sealed agreement, in which he stipulated, that in a certain event he would divide the slaves mentioned in the deed of gift equally between himself and a grandson of the donor; *it was held*, that upon the event happening, the grandson was tenant in common with the donee of the slaves, and was entitled to a partition of them, and to have an account of their hires and profits, and a decree for one-half of the same.

The plaintiff brought his suit against the defendant for a partition of the slaves mentioned in a sealed agreement referred to and made part of the bill, and also for an account of the hire and profits of the said slaves, and to be decreed a moiety of the same. The slaves originally belonged to Willie Bunn, the plaintiff's maternal grandfather. Bunn had been sued at law

for the said slaves by the administrator of William Parker, the father of the plaintiff, and pending that suit, Bunn made a deed of gift of the said slaves to the defendant, Vick, who cotemporaneously, viz: on the 9th of December 1829, executed to Bunn the agreement set out in the plaintiff's bill. By the said covenant, the defendant stipulated and agreed that he would attend to the suit at law for Bunn, and if Parker's administrator should fail to recover the slaves, he then further agreed that the slaves named in the covenant should be equally divided between himself and the plaintiff, who was a son of his wife by a former husband. Parker's administrator failed in the suit at law, and the defendant took possession of all the slaves mentioned in the agreement, and had received their profits ever since the date of the same.

The defendant resisted the plaintiff's claim, because, as he alleges, Bunn, at the time the agreement was executed, stipulated by parol, that the defendant should board, clothe, and educate the plaintiff, and at his arrival at the age of twenty-one years, should then give him one-half of the slaves, and that the plaintiff was to have none of their profits during his infancy—his board, clothing and education being in lieu thereof. [196] The defendant said that this stipulation was intended to be reduced to writing, but never was. He further insisted that the instrument transferring the slaves from Bunn was testamentary; that Bunn had since died, after making a will revoking the said instrument, and had by his said will given all the slaves mentioned in the bill to his, the defendant's wife.

A replication was filed to the answer, and proofs taken, when the cause was set for hearing and transferred to the Supreme Court.

B. F. Moore, for the plaintiff.

Devereux, for the defendant.

Daniel, Judge, after stating the case as above, proceeded as follows: The execution of the agreement by the defendant as set forth in the bill, is proved to the satisfaction of the Court, both by the testimony of the subscribing witnesses to it and by

the admission of the defendant in his answer. Evidence of the parol agreement made between Bunn and the defendant, as stated in the answer, cannot be received, because, it being alleged to have been made at the time, and there being no reason assigned why it was not incorporated therein, its reception would tend to contradict, add to or vary the written agreement, which the law will not permit to be done by parol evidence. *Secondly*, The deed of gift of the slaves, which Bunn made to the defendant, is not produced in evidence. It is admitted and recited as a "deed of gift" in the agreement executed by the defendant to Bunn. There is not a particle of evidence in the cause to show that to be a testamentary paper. The Court is therefore of the opinion, that the plaintiff is in equity a tenant in common with the defendant of all the slaves and their increase which are comprehended in the agreement attached to the bill and executed by the defendant to Bunn, on the 9th of December 1829. The Court is also of the opinion, that the plaintiff is entitled to a decree for partition of the said slaves, and to have his moiety assigned to his guardian for his use in severalty; and also that he is entitled to an account of the hires and profits of the said slaves, and a decree for one-half of the same. In taking this account the commissioner [197] will allow the defendant all just charges either against the property or the plaintiff.

PER CURIAM. Decree accordingly.

NOTE.—About the general rule of evidence, that where the parties to a contract have reduced their agreement to writing, parol testimony shall not be received to add to, vary or contradict, the written instrument, there can be no doubt; but it will be seen that it applies only to the parties themselves, and those claiming under them, and not to a controversy between one of the parties and a stranger. See *Pender* v. *Fobes*, 1 Dev. & Bat. Rep. 250, and the note to that case in the second edition. For apparent exceptions to the rule, see the cases of *Twidy* v. *Saunderson*, 9 Ired. Rep. 5; *Manning* v. *Jones*, Busb. Rep. 368, and *Daughtry* v. *Boothe*, 4 Jones' Rep. 87. The facts allowed to be proved by parol in these cases were really distinct from the terms embraced in the written contract and were not intended to be included in it. See also *Johnston* v. *McRary*, 5 Jones' Rep. 369, where the time of the delivery of cotton sold was allowed to be proved by parol, though the other terms of the contract of sale were in writing.

EQUITY CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NORTH CAROLINA.

JUNE TERM, 1839.

PATRICK MURPHY, Adm. of ISAAC W. GRICE, *v.* SUSAN R. GRICE et al.

By marriage, the husband acquires all the personal chattels of his wife in possession; and, as at law the possession of the *cestui que trust* is the possession of the trustee, so in equity the possession of the trustee is the possession of his *cestui que trust;* consequently, in equity the husband will be entitled to all the personal chattels of which his wife is the beneficial owner, and which are in the possession of her trustee.

Every possession held for the owner of property and in assertion of his claim of dominion, being an application of the property to the service of the owner, is the possession of the owner by his agent, curator or bailee. Where the *cestui que trust* incurs costs at law, in defending a title purely equitable against his trustee, without coming at once into the proper forum for redress, he cannot in equity recover his own costs expended at law, but he will be reimbursed the costs paid to the trustee in the suit at law.

A marriage being contemplated between Abner Branson and Susan R. Cox, articles of agreement were entered into between the said parties and a common friend, Isaac B. Cox, by which it was covenanted that after the marriage, the said Isaac should hold certain slaves, then the property of Miss Cox, to her sole and separate use forever; and whereby Branson bound himself at any time after the marriage, when he might be thereunto required, to make a conveyance of the legal estate to the said Isaac, in trust, to fulfil the purposes of the settlement. Branson died shortly after the marriage took place, without having made, or having been required to make, the legal conveyance; and the trustee, Isaac B. Cox, took possession of the said slaves in behalf of Mrs. Branson, hired out some as her trustee, and

delivered over others to her. She then intermarried with Isaac W. Grice, who took immediate possession of the last
[200] mentioned slaves, and died before the expiration of the term for which the rest had been hired out. Upon the death of Grice, Henry Branson, the administrator of Abner Branson, the first husband, brought an action of detinue against the plaintiff who had administered on the estate of Grice, the second husband, and who held the negroes that were in the actual possession of his intestate. In that action the plaintiff had judgment, because the *legal* title did not pass by the marriage articles, but vested, upon the marriage, in Abner Branson.

The plaintiff then brought this bill against Henry Branson, Isaac B. Cox and Mrs. Grice, seeking to enjoin the execution upon the judgment at law, and praying for a surrender of the other negroes, for an account of their hires since the death of his intestate, and for a conveyance of the legal title.

W. H. Haywood and *Strange*, for the plaintiff.

Henry, for the defendants.

Gaston, Judge.—The facts of this case are undisputed, and the equity upon them is obvious. (His Honor here recited the facts as above and proceeded.) We are of opinion that the plaintiff is clearly entitled to the relief asked for. Nothing is better established than that marriage is a gift to the husband of all the personal chattels of the wife in possession. As the beneficial interest in the slaves, at the time of Grice's marriage, was wholly in Mrs. Branson, they were then, in the contemplation of a Court of Equity, her slaves. This indeed is not contested. But we hold it to be equally indisputable, that they were her slaves *in possession*. As at law the possession of a *cestui que trust* is the possession of the trustee, the legal owner; so in equity, the possession of a trustee is the possession of the *cestui que trust*, the beneficial owner. The principle which prevails in both courts is the same, and is, in truth, but a principle of good sense, that every possession held for the owner of property and in assertion of his claim of dominion, being an application of the property to the service of the owner, is the possession of the owner by his agent, curator or bailee.

Upon the second marriage, therefore, these slaves, which were, in equity, absolutely the slaves of the wife, became as absolutely the slaves of the husband. The argument for the defendants is predicated upon the assumption that, at the time of this marriage, the slaves were *choses in action*, not reduced into possession; but as this assumption is unfounded, the argument necessarily falls with it.

The plaintiff, under the rule established in *Keaton* v. *Cobb*, 1 Dev. Eq. Rep. 439, must pay his own costs incurred in the suit at law, by there setting up a defence which was in law untenable; but he is to be relieved from paying the defendant, Branson, *his* costs recovered in that action, and is also entitled to recover from the defendants the costs of this suit.

PER CURIAM. Decree for the Plaintiff.

NOTE.—Upon the main point, see, in support of the decision, *Miller* v. *Bingham*, 1 Ired. Eq. Rep. 423; *Apple* v. *Allen*, 3 Jones' Eq. Rep. 120; *Bridgers* v. *Wilkins*, Ibid. 342.

HENRY FOSTER et al. *v.* AMOS JONES.

Where a bill alleged that, at an execution sale of the lands of the plaintiff's deceased father, a certain person, by representing that he was purchasing for the plaintiffs, prevented competition, and thereby obtained the lands at an under value, and afterwards sold the same to the defendant, who pretended that he was buying for the plaintiffs, but afterwards refused to acknowledge the trust, and convey the land to them, *it was held* that, upon its appearing from the proofs that the purchaser at the execution sale did not in fact buy the lands for the plaintiffs, but *bona fide* for himself, it was not necessary to consider whether the defendant bought upon any trust, and if so, upon what trust, for the plaintiffs; for that, unless the facts proved agreed with those alleged, the plaintiffs could not have any decree, and the foundation of their claim, as alleged, was an original purchase in trust for them by the purchaser at the execution sale, and a devolution of *that trust* upon the defendant.

The original bill in this case was filed on the 29th of September 1836, by Henry Foster, Hezekiah Terrell and Sarah his wife, John Foster and Joseph J. Foster, plain- [202] tiffs, against Amos Jones, defendant. The bill was afterwards permitted to be amended, and as so amended, charged in substance, that a judgment had been rendered in the Coun-

ty Court of Franklin, at the instance of certain infants suing by Charles A. Hill, their guardian, against the personal representatives of Christopher Foster, deceased; and there being no personal assets of the said Christopher, in the hands of these representatives, to satisfy the judgment, a *scire facias* was sued out in due form of law against the plaintiffs, to shew cause wherefore the real estate of the said Christopher, which had descended unto the plaintiffs, Henry, Sarah, John and Joseph, should not be sold for the satisfaction of the judgment; that upon this *scire facias*, there was an award of execution, and the said execution was levied upon a tract of land in said county, which had so descended; that, on the 2d Monday of December 1830, this land was sold at public sale, when the said Chas. A. Hill purchased the same at the sum of $895, or thereabouts, the amount of the judgment and costs, and took a conveyance from the sheriff therefor; and that the said Hill afterwards sold and conveyed the same to the defendant, who entered thereon, and had been making large profits therefrom. The plaintiffs further charged, that the said Hill, well knowing that the land was worth the sum of $2000, being desirous, while he secured the debt due to his wards, also to aid and assist the plaintiffs, because of his long friendship for their father, did declare and agree, before he bought the said land, that he would bid off the same, and hold it merely as a security for the re-payment to him of the money due upon the judgment, for which he was thereby to become personally accountable to his wards; that the knowledge of this agreement and declaration prevented the by-standers from competing with the said Hill, and caused the land to be sold so far below its value that there were friends of the plaintiffs who were willing to buy and hold the land merely as a security, until the plaintiffs could refund the price, but were prevented from doing so, because of this agreement and declaration; that the said Hill, after his purchase, admitted and declared that he was but a trustee for the plaintiffs, and bound to convey the said land to them, upon their paying him
[203] the amount of the said judgment and costs; and that the said Hill was induced to convey the said land to the defendant, upon his representation that he was acting for and in behalf of the plaintiffs, the children of his sister; and that the

conveyance to the defendant was made upon express condition that he should hold the land upon the same trusts, and permit the said plaintiffs to redeem. The plaintiffs complained that the defendant, after having procured this conveyance to himself, and, after the death of the said Hill, supposing that the plaintiffs would be unable to make proof of the trusts upon which the said land was held by Hill, and conveyed to the defendant, had utterly denied the right of the plaintiffs to redeem, and insisted to hold the land as his absolute property. The prayer was, that an account might be taken of the rents and profits, and the defendant decreed to convey the land to the plaintiffs, upon their paying to him, after deduction of those rents and profits, what might be equitably due to him, because of the moneys so by him advanced.

The answer of the defendant denied that the late Charles A. Hill, so far as he knew or believed, made any such agreement as that charged relative to the purchase of the land at sheriff's sale, or that he bought upon any understanding with the plaintiffs, or any person whatever, to hold the land as a security or upon an agreement for redemption; said that the defendant was not present at the sale, but on the evening of the day of sale, he met with the said Hill, who told him that after the land had been "knocked off" to him, as the highest bidder, hearing that it was not worth the money, he had withdrawn his bid; that the land was set up again, and he then being determined that it should make the money due his wards, renewed his bid; that the heirs of Christopher Foster were vexed with him for doing so; and that, on the same evening, Henry Foster, one of the heirs, applied to him to learn whether he would take the price which he had bid, but that he had refused to do so. The answer denied also, that the said Hill, by any declarations or acts, caused an impression to be made, or belief entertained, that he was purchasing for the benefit of the [204] heirs, whereby any person was induced to refrain from competing with him, and insisted that he bought absolutely and fairly for himself, and not for the use or benefit of any other person. The answer denied that the said Hill ever admitted, after the sale, that he had bought upon a trust for the plaintiffs; and most explicitly and peremptorily denied that the

defendant represented to the said Hill, that *he* was buying as the friend of the plaintiffs, or that he did buy upon any trust or stipulation for their benefit, or upon any understanding that they were to be allowed to redeem, or in any manner for the use or benefit of any person or persons but himself. The answer stated, that the defendant purchased and obtained his conveyance in December 1830, a few weeks after Hill's purchase; that he gave for the said land the sum of $1000; whereof he paid $500 in cash, and executed his note for the payment of the other $500, with interest from the date of the purchase; that this price was nearly, if not quite, its value; and that desirous as he was of procuring it on account of its peculiar location, he would not have given $1200 for it. The answer further set forth, that having understood, after Hill's purchase, that he was willing to sell the land for $1000, of which $500 was required to be paid down, the defendant had proposed to his nephews that if they wished to re-purchase it, and would let him have a small part of it lying near defendant's house, he would assist them to make the purchase; that upon its being said by the plaintiff John, or by his mother in John's presence, that the plaintiff Henry would not join in the purchase, the defendant then proposed to John, that if he and his brother Joseph would make up $300, he would lend them $200, so as to enable them to make the immediate payment of $500, which, it was understood, Hill required as indispensable, and would wait with them for the money so lent, until they should have repaid the $300 they should have borrowed elsewhere, on condition to give the defendant the small piece before mentioned; that the said John seemed to approve of the proposal, and stated that he would, in a few days, go to Halifax, where he expected to obtain the $300, and would then return and see him on the subject; that the defendant waited several days,
[205] and hearing no more from the said John, concluded that he had abandoned the idea of buying; that apprehending some other person would buy whom he should not like for a neighbor, he then applied to the said Hill and bought the land for himself, in the manner before stated, and had paid up the whole of the purchase money therefor, and insisted that he bought *bona fide* for himself, and without any notice of the pre-

tended trust upon which it was alleged that the land was held by the said Hill. The answer further set forth, that the plaintiff Hezekiah, since the purchase by the defendant, had rented from him a part of the land so bought, without any pretence that the same had been bought for, and on account of, the plaintiffs; and the plaintiff John had several times made propositions to buy the land from the defendant; that he and the defendant could not agree upon the terms; and that the said John, in these negotiations, did not pretend or set up any claim to the land itself, under any allegation that he or the plaintiffs had a right to redeem. To this answer, the plaintiffs replied generally, and the parties having taken their proofs, the cause was set down for hearing, and transmitted to this court.

The case was submitted without argument by

W. H. Haywood, for the plaintiffs, and

Badger and *Battle*, for the defendant.

Gaston, Judge, having stated the case as above, proceeded as follows: Upon the proofs, we have no hesitation in declaring that the allegation in the bill, that the late Mr. Hill purchased the land at the sheriff's sale in trust for the plaintiffs, and upon an agreement to hold the same as a security only, is not merely not established but is disproved. No objection has been made to the evidence because of its being *parol* testimony; and therefore, without inquiring whether it might not have been objected to on that account, we have fully considered the whole of it. In the first place, there is not a particle of proof that the bystanders understood or supposed that Mr. Hill was buying the land in for the plaintiffs, and on that account declined from competing with him at the sale. In the next place, no individual testifies that he was present when the alleged agreement was entered into, and much less that he was [206] called upon to take notice of the nature and terms of that agreement. The sole testimony on which the plaintiffs rely to establish this agreement, is that of witnesses who speak to loose declarations of Mr. Hill, probably imperfectly understood and yet more imperfectly remembered. This is to be found in the depositions of William D. Jones, Aaron Bledsoe

and Henry Cooper. The first of these was the *crier* at the sale, and he testifies that before the sale began, he saw Mr. Hill and some of the plaintiffs in private conversation; that after this, and as the sale was about to begin, Mr. Hill told him that he was about "to enter into a disagreeable business, to buy the land *for* the boys;" that after the sale, he heard Mr. Hill say that he had bought it for the boys. He does not know that any notice of this intention of Mr. Hill so to buy was, at the time of the sale, given to others, nor that it in any respect influenced the price of the land. He also states the fact, that while the land was up, Mr. Hill recalled his bid, went off into the court house, and then returned and renewed it. Aaron Bledsoe testifies, that after Mr. Hill had sold the land, he heard him say that he had bought it for the Foster boys, and had sold it to Jones under the understanding that Jones was buying for them; and Henry Cooper deposes, that after Mr. Hill had bought the land, the witness, supposing that he intended to settle negroes on it and would want an overseer, applied to Mr. Hill to be retained as such, when the latter declined employing him, saying that he had bought it for the young Fosters and did not mean to settle it. Were this *all* the evidence, it would be very unsatisfactory on which to declare the existence of the agreement alleged in the bill. It was so easy to mistake a remark of Mr. Hill, that he was about to do a disagreeable business in buying the land *of* the boys, for the one supposed by the witness, Jones, of buying it *for* the *boys;* and also so easy to misinterpret general declarations of a willingness or an expectation to let the heirs of Foster have the land again, into acknowledgments of a purchase on their account; that we should certainly hesitate very much, to say the least, in founding any decree thereon. But there is plenary evidence, we think, that in fact the witnesses have so misapprehend-
[207] ed the remarks about which they testify. Washington Branch, a witness for the plaintiffs, deposes, that on the day of the sale, he, in the behalf and as the friend of the plaintiffs, applied to Mr. Hill to learn whether he would let the plaintiffs have the land back, and was answered that he would, at the price of $1000; that having been put to the trouble of buying, he was determined not to sell without being paid for

his trouble. Frederick Leonard, who was present at the sale, also, at the instance of Henry Foster, one of the plaintiffs, made the same application to Mr. Hill, on the same evening, and received the same answer. This witness communicated Mr. Hill's terms to Henry, and he declined the purchase. There is not the slightest intimation from these agents for the plaintiffs, that it was then pretended that Mr. Hill had bought under any agreement with or in trust for them; and the latter is explicit in declaring that he understood that Mr. Hill purchased absolutely and for himself. The sheriff, Henry G. Williams, who sold the land, the witness Leonard, Benjamin Bledsoe and Richard Noble, who were present at the sale, all understood that Hill was buying absolutely for himself. The plaintiffs have not pretended that Mr. Hill was unfaithful to his alleged engagement; but have insisted that he always recognized the trust, and conveyed to the defendant expressly as his substitute, and in trust for them. Mrs. Hill, his widow, and Daniel S. Hill, his son, have been examined upon this part of the case. The former has never heard any such recognition; the latter is full and explicit against it, and his testimony relating to a part of the *res gestæ*, is material and strong, to disprove the pretended trust. He was present at the sale, and on the evening after it was made, and, as we collect from his deposition, before the applications to his father through Branch and Leonard, heard his father relate the circumstances under which he purchased. His father said, that he discovered that there was a disposition manifested by some persons to hurt the sale of the land, by depreciating its value as being less than what was bid for it; that he then went off and ascertained what was the amount necessary to be raised to pay off the judgment of his wards; that he returned and bid that amount, declaring that if any person would bid more, he might [208] have it; that he heard his father say, that his sole motive for buying was to save the debt for which he considered himself responsible; that the heirs ought not to be angry with him, for they had had a fair opportunity of buying; that he was under no obligation to let them have it back; he has heard his father since say that they might have it back for $1000; and that he was disposed to give them a preference, at that price,

to any other person; but, as he collected from his father's declarations, he felt himself at liberty to sell to any other person. This evidence is strongly confirmed by the deposition of William K. Falkner, taken by the plaintiffs. He is examined as to Mr. Hill's declarations to him, after the purchase by Jones, and states that Mr. Hill inquired if there was not a dispute between Jones and the boys in relation to the land; and, upon being informed that there was, and that it was said the boys found some fault with *him*, he answered that they had no cause to be displeased; that he had waited a considerable time to see what they would do; that when he bought, (meaning no doubt the applications herein before mentioned,) they had made application to him, to get the land back, but had never since said a word more to him on the subject; that he was in debt, and *obliged* to have money, and sold the land to raise it. The testimony of Aaron Bledsoe, weak as it is, is rendered yet weaker by a fact which is testified by Benjamin Bledsoe, that the said Aaron informed him, that in a conversation with Mr. Hill about the land, before he sold it to Jones, Mr. Hill observed, that if he could not sell, he would settle his son-in-law, Dr. Malone, upon it. If, in connection with this evidence, we consider the extraordinary character of the trust alleged—that Mr. Hill, who, though a man of property, was then in debt, and pressed for money to pay it, would bid off the land for the amount of the judgment and make himself thereby accountable to his wards for so much money in his hands, yet hold the land simply as a security, allowing the plaintiffs an unlimited time for redemption—we hazard nothing, we think, in pronouncing that he did not purchase in trust for the plaintiffs, as by them alleged.

This allegation being disproved, it is not material to examine whether the defendant bought upon any trust, and
[209] if so, what trust, for the plaintiffs; for unless the facts proved agree with those alleged, the plaintiffs cannot have a decree; and the very foundation of their claim, as alleged, is an original purchase in trust for them by Hill and a devolution of *that trust* upon Jones. We have, however, examined all the evidence relating to Jones's purchase; and we are obliged to say, without commenting minutely upon it, that

this evidence leaves it wholly uncertain whether Jones bought upon any previous agreement with the plaintiffs, or only with an intention to make an arrangement with them, which had been talked of before his purchase, and which, it was thought, would be mutually agreeable; and equally in doubt, if there was a previous agreement, whether, by that agreement, the plaintiffs were to have the whole of the land or all except the part close to Jones's house, and, therefore, peculiarly desirable to him. In this state of the evidence, independently of the failure of the plaintiffs to shew a trust in the original purchaser, their bill could not be sustained.

The bill of the plaintiffs is to be dismissed; and, because of the falsehood in the main allegation, it should be dismissed with costs.

PER CURIAM. Bill dismissed.

NOTE.—That the proofs must correspond with, that is support, the allegations of the pleadings, is as well established in equity as it is at law. See *Mallory* v. *Mallory*, Busb. Eq. Rep. 80; *Lee* v. *Foard*, 1 Jones' Eq. Rep. 125, and *Craige* v. *Craige*, 6 Ired. Eq. Rep. 191.

ROBERT FOSTER et al. *v.* ROBERT N. CRAIGE et al., Ex'rs of ANDERSON E. FOSTER.

Where a testator, after several devises and bequests, concluded thus: "The balance of my *property* to be applied to the payment of my just debts. Should there be a surplus, it is my will and desire that it be equally divided among the heirs of my deceased brother S. F. and the heirs of D. C."—*It was held*, that as the "property" mentioned in the will was a mixed fund of real and personal estate, and was to be applied in the first place to the payment of debts, the executors had a power by implication to sell a tract of land not specifically devised, for the payment of debts and for distribution.

Where there is in a will, a general direction to sell lands, but it is not stated by whom the sale is to be made, there, if the produce of the sale is to be applied by the executors in the execution of their office, a power to sell will be implied to the executors.

If a testator simply directs the distribution, among certain objects, of an unmixed fund arising from the sale of land only, then the heir alone can sell.

The word "property" is equivalent to "estate" in its operation to pass the interest in land as well as the land itself, and land will pass in a will by either of those words.

The defendants, as the executors of the last will of Anderson E. Foster, sold to the plaintiffs a tract of land belonging
[210] to the estate of the said Anderson, made a deed of bargain and sale for the same, and took a bond for the purchase money, upon which they afterwards obtained a judgment and issued execution at law. The plaintiffs then filed this bill, and obtained an injunction restraining the collection of the debt, on the ground that the defendants had no power or right to make title to the said land. The will of Anderson E. Foster contained the following clause: "As to the disposition of my worldly estate, both *real* and personal, I make the following, viz: Item, I give and bequeath to my sister, &c." The testator then proceeded to make several devises and bequests, and concluded the disposition of his estates thus: "The balance of my *property* to be applied to the payment of my just debts. Should there be a surplus, it is my will and desire that it be divided equally among the heirs of my deceased brother Samuel Foster, and the heirs of David Craige." The defendants were appointed executors, and qualified as such. The testator was in debt about $15,000. The land sold was a portion of the balance of the testator's property not before devised or bequeathed by the will. The executors, in their answers, averred that they sold the land to pay the debts, and to distribute the surplus agreeably to the directions of the will. The case was heard in the Superior Court of Davie county, on the last circuit, before his Honor Judge Nash, on a motion to dissolve the injunction; and the injunction being dissolved, the plaintiffs appealed from this interlocutory order.

No counsel appeared for the plaintiffs in this court.

Hoke, *Alexander* and *Boyden*, for the defendants.

Daniel, Judge, after stating the case as above, proceeded as follows: Where there is in the will a general direction to sell lands, but it is not stated by whom the sale is to be made, there, if the produce of the sale is to be applied by the executors in the execution of their office, a power to sell will be implied to the executors. *Tylden* v. *Hyde*, 2 Sim. & Stu. 288. The principle that a direction that lands shall be sold, generally, (with-

out saying by whom,) for a purpose which brings the [211] fund within the province of the executors, as to pay debts or legacies, or both, confers on them a power of sale by implication, is established by several cases. *Inchly* v. *Robinson*, 2 Leon. 145; *Carvill* v. *Carvill*, 2 Chan. Rep. 301; *Lockton* v. *Lockton*, 1 Cha. Cas. 179; *Blatch* v. *Wilder*, 1 Atk. Rep. 420; 1 Powell on Devises 244, (Jarman's Edition, note 4.) If the testator had simply directed the distribution, among certain objects, of an unmixed fund arising from the sale of land only, then the heir alone could sell. *Bentham* v. *Wiltshire*, 4 Madd. Rep. 44. But in the case before us, the fund is not only one that is mixed of real and personal estate, but is one for the payment of the testator's debts; and the surplus thereafter only to be distributed among certain objects. *Tylden* v. *Hyde* was a case where a mixed fund of real and personal estate was directed to be sold and converted into money, and the same to be distributed among certain objects. The Vice Chancellor nevertheless said, "here the produce of the sale is to be confounded with the personal property, which must necessarily be divided by the executors, and a power to sell is therefore implied to the executors." That the "property" which the testator directed to be applied to pay his debts, included his undisposed of lands, is evidently to be collected from what he has said in the other parts of his will. The word "property" is also equivalent to *estate*, in its operation to pass the interest in the land, as well as the land itself; and land will pass in a will by either of the said words. *Roe dem. Shell* v. *Pattison*, 16 East 221; *Nichols* v. *Butcher*, 18 Ves. 194; *Patton* v. *Randall*, 1 Jac. & Wal. 189; 2 Powell on Dev. 419, (Jarman's edition.) The testator does not, in so many words, direct a sale of the balance of his property; but he says it shall be *applied* to pay his debts. It cannot be applied in that manner without a sale; a sale is therefore ordered by the testator himself; and the executors had an implied power to convey. The deed executed by the executors conveyed what title the testator had in the land, to the present plaintiffs. We are, therefore, of the opinion, that the interlocutory decree in the Superior Court was correct. This opinion is to be certified to the Court be- [212] low, and the plaintiffs must pay the costs of the appeal.

PER CURIAM. Decree to be affirmed.

NOTE.—Where a testator gives power to his executors to sell land, and no executors are named in the will, the administrator with the will annexed may exercise the power of sale, under the act of Assembly, 1 Rev. Stat. ch. 46, sec. 34. See Revised Code ch. 46, sec. 40. For the extent of the meaning of the word "property" in a will, see *Hurdle* v. *Outlaw*, 2 Jones' Eq. Rep. 75, and *Webb* v. *Bowler*, 5 Jones' Rep. 362.

SAMUEL T. HAUSER et al. *v.* CHRISTIAN LASH, Adm'r of GEORGE HAUSER.

A pretended absolute purchase of slaves, *held*, upon the proofs, to have been a conveyance to the defendant, as a security for the moneys by him advanced, and the liabilities by him incurred, in removing the incumbrance of an execution, which had been levied upon them;—and it was held further, that a pretended sale of the slaves by the defendant, as his own, after the death of the alleged vendor, and a purchase of them for him by his agent, did not, in any manner, affect the rights of the next of kin of the intestate vendor, in the equitable interest which he, the intestate, had therein at his death.

It was charged by the plaintiffs, that on the 6th of March 1818, a few months before the death of the defendant's intestate, he being sorely pressed to raise the sum of $818, to meet an immediate emergency, applied to the defendant, his brother-in-law, for aid in procuring the money; that the defendant advanced part of this sum, and, by his guaranty, enabled his intestate to procure the residue; and that, for the purpose of securing to the defendant the re-payment of the advancement so made, and indemnity against the liability so incurred, the intestate executed to the defendant a bill of sale for five negroes, Will, Chrissey, Lessy, Milly and Wesley. They charged that the value of the slaves, at the time of this transaction, was $2000; that the slaves remained in the possession of the intestate until his death, and in the possession of his family until the 8th of January 1819, when the defendant, having taken possession of them, as the administrator of the intestate, caused them to be set up for sale as a part of the property of the said intestate; that the said sale, or pretended sale, was conducted fraudulently; for that it was hurried on at an unusually early hour,
[213] before the company expected had fully assembled; and for that all the negroes were put up in one lot, and to be sold for cash, and not on credit, as by law directed; and that

the said pretended sale was null, for that all the negroes were bid off for the defendant by one Jacob Conrad, as his agent. The plaintiffs, therefore, claimed that the said slaves and their increase, and the hires and profits thereof, should be declared to be a part of the personal estate of the intestate in the hands of the defendant; and, after reimbursement of the defendant's advances and exoneration of his liabilities, be delivered over for distribution to the plaintiffs.

The defendants denied that the conveyance of the negroes aforesaid was made as a security, but insisted that the same was made truly for the purpose it expressed, of conveying to the defendant the absolute ownership of said slaves, sold by the intestate and purchased by the defendant, at the price of $818, actually paid therefor. The defendant said that his intestate had been nearly stripped by his creditors of all his property, except the said negroes; that an execution had been levied on them to raise the sum of $818; that his intestate, from motives of humanity, was anxious to prevent a sale of them under execution, and proposed to sell them all to the defendant; that the defendant had no immediate use for the slaves, and no desire to hold that species of property, and communicated these facts to the intestate; but, nevertheless, offered to pay the sum of $818, the amount of the execution, to the sheriff, and take his intestate's conveyance of the slaves; that this being assented to, the defendant paid the said sum to the sheriff, ($300 whereof he borrowed from John Shore,) and took the bill of sale in question; that during the whole of this transaction, not one word passed between the parties that the bill of sale should operate as a security; but that on the day after the business was concluded, the defendant, knowing that the intestate expected, or had expressed an expectation, that an important equity suit, instituted by him in Rowan Superior Court, would be speedily decided in his favor, told the intestate, than on refunding within three weeks the money paid by the defendant as the price of the negroes, the same should be [214] re-conveyed to the intestate; and defendant declared that this was a purely gratuitous offer on his part, and not the consequence of any previous agreement or arrangement between him and the intestate. The defendant admitted that he

permitted the said slaves, as he had no immediate use for them, to remain with the intestate; but averred that he took possession of them after his intestate's death, as his own; and that at the time of selling the effects of his intestate, he set up these also for sale, but that he offered them for sale as his property, and not as the property of his intestate; that the sale was for cash, and at a time when he thought he could obtain a full price for them, because he wanted to turn them into money; that they were run up beyond their value by Henry Hauser, one of the intestate's children; and that, knowing the said Henry had not the cash to pay for them, he had them bid off for himself by Jacob Conrad, at a price between $1,500 and $1,700; and that ever since he first took possession of the slaves, he had continued to hold them, and yet held them, as his absolute property, under the sale so made to him by his intestate.

J. T. Morehead, for the plaintiffs.

Badger and *Boyden*, for the defendant.

Gaston, Judge.—The plaintiffs, the next of kin of George Hauser, deceased, seek, by this bill, from the defendant, the administrator of the said George, an account of his administration of the estate of his intestate. Their right to an account is not resisted; and a reference to a commissioner for that purpose follows of course, according to the usages of this Court. But there is one matter which has been distinctly put in issue by the pleadings, proper to be decided before the account is taken, and upon which the parties have brought the cause to a hearing. (His Honor here stated the allegations of the pleadings as above set forth, and then proceeded as follows:) Upon the proofs, we hold it clear that the transfer of the slaves was not made as an absolute sale to the defendant, but that it was made upon an understanding between him and his intestate, that the same should be a security for the money advanced and the liability incurred by him in raising the sum of $818 to pay off the incumbrance of the execution then levied upon
[215] them. All the circumstances of the transaction are inconsistent with the idea of an absolute sale. A specific sum was wanted by a needy and hard pressed man for a special

emergency, and this precise sum was raised through the agency of his friend and near connection. Now, it is most extraordinary, if the object of the defendant was a purchase, that his *offer* should be regulated, not by any reference to the value of the property to be bought, but exclusively by the amount of the incumbrance from which it was to be relieved. In the next place, the price alleged to have been paid was *grossly* inadequate to the value of the slaves. The pretended sale by the defendant, on the 8th of January 1819, is certainly not a fair criterion of their value; for that was marked by many circumstances clearly intended and well calculated to prevent their bringing a full price. They were set up for sale all in one lot, and for cash, without any notice *antecedent* to the day of sale that they would be thus sold: and they were bid off at an unusually early hour of the day, before the arrival of several persons, who went for the express purpose of purchasing some of them. Yet, even at this pretended auction, they were bid off by the defendant's agent, not, as he loosely alleges in his answer, at a sum between $1,500 and $1,700, but for the sum of $1,705—more than twice the price which he alleges to have paid for them; and not a witness has been examined to shew they were not worth this sum. Now, making every allowance for the alleged solicitude of the intestate to sell the slaves himself, rather than permit them to be sold at execution, where is to be found the motive for selling them to the defendant for less than half the money which might be obtained for them from others? Besides, the transactions at the pretended sale in January 1819, are utterly inexplicable, upon the supposition that the defendant *alone* was interested therein. We have already seen that it was purposely so managed as to prevent competition. There is no doubt but that the negroes were put up as defendant's property, and not as the property of his intestate, and for cash, and that these matters were declared in a written notice, affixed to a public place, *at the day* of sale; but if the object had been to command the highest [216] price, why were they sold for *cash*, instead of the usual credit; or, if to be so sold, why was no *previous* notice given of the terms, so that purchasers should come prepared? Several witnesses, who have been examined, declared that they attend-

ed with the design of buying; that they attended under the expectation that the property would be sold on the usual credit; and that when they arrived, at an early hour, they were surprised to find that the sale was over, that it had been made for cash, and all the negroes bid in by Conrad. Moreover, the defendant declares that his object in the alleged sale was, to turn this species of property, to the holding of which he has so strong a repugnance, into cash; and yet, we not only find him employing an agent to purchase the property apparently for the agent and in truth for himself, but actually holding the property as his own down to this day. But the case does not rest on these circumstances, strong as they undoubtedly are. There is unquestionable testimony, as we think, furnished by the defendant himself, as to the character of his alleged purchase in March 1818, and the purposes of the pretended sale in January 1819. On the second of February 1819, the defendant addresses a letter to Samuel Thomas Hauser, one of the plaintiffs, in relation to the family and concerns of his late father, in which he says, respecting the latter, "In *my last* I mentioned to you that I had purchased the plantation at sheriff's sale for $2,210. I have *taken possession* of Will and his family, and *keep* them on the place for the sum of $1705—*this* being the *highest bid*, and *was the only way to establish the value of them.*" It is manifest, therefore, that he held himself accountable, if he kept the negroes, for their *actual value;* and that the stratagems resorted to in order to prevent competition at the bidding, were to enable him to claim them at a price short of their actual value.

But this is not all. The defendant avers in his answer that the sum of $300, part of the price which he actually paid for the purchase of the negroes, was borrowed by him at the time from John Shore. Shore has been examined as a witness, and declares that application was made to him for the loan of this money, first by George Hauser, in person, and afterwards by John Henry Hauser, in behalf of his father, George; that when this second application was made, Henry produced a letter from the defendant, which the witness exhibits, and which is dated on the 6th of March 1818, and is in these words:

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"Mr. John Shore: If you can oblige the bearer, J. H. Hauser,

with 200 or 300 dollars, *I will be his security* for the payment against the time he promises:"

That thereupon the witness lent the money, and took the note of J. H. Hauser and the defendant, the said Hauser signing first. The witness further adds that this note remained unpaid, except the interest thereon, until 1832 or 1833, when the defendant took it up and gave his own bond for the amount. It is not, therefore, true, that at the time of the alleged purchase of the negroes in March 1818, the defendant had paid the price. $300, part of the sum of $818 wanted to relieve the negroes from the execution, were borrowed by the intestate himself, or by his son on account of the intestate, and the defendant had only made himself liable therefor as a surety of the borrower.

Upon the whole view of the allegations and proofs, the Court declares that the slaves in question were conveyed to the defendant only as a security for the moneys by him advanced and the liabilities by him incurred, in removing the incumbrance of the execution then levied upon them; and that the pretended sale of them by the defendant, in January 1819, has in no manner affected the rights of the next of kin of the intestate, in the equitable interest which the intestate had therein at his death.

PER CURIAM. Decree accordingly.

NOTE.—See *Bethune* v. *Terry*, 1 Ired. Eq. 397. On a bill to redeem property, conveyed to the defendant by a deed absolute on its face, a court of equity will not relieve upon mere proof of the party's declarations. There must be proof of fraud, ignorance or mistake, or of facts inconsistent with the idea of an absolute purchase. *Kelly* v. *Bryan*, 6 Ired. Eq. Rep. 283; *Lowell* v. *Barrett*, Busb. Eq. Rep. 50; *Clement* v. *Clement*, 1 Jones' Eq. Rep. 184; *Briggs* v. *Morris*, Ibid. 193; *Lamb* v. *Pigford*, Ibid. 195; *Taylor* v. *Taylor*, Ibid. 246; *Colvard* v. *Waugh*, 3 Jones' Eq. Rep. 335; *Brower* v. *Carson*, Busb. Eq. Rep. 272, and *Latham* v. *McRorie*, 4 Jones' Eq. Rep. 102.

JOHN SALTER *v.* THOMAS H. BLOUNT, Adm'r. of JOHN M. OVICE, et al. [218]

Where an administrator takes possession of the effects of his intestate, and dies, and administration is granted upon *his* estate, and more than seven years after-

wards administration *de bonis non* is taken upon the first intestate's estate, the act of 1715, 1 Rev. Stat. ch. 65, sec. 11, will not bar a suit, at the instance of the administrator *de bonis non*, against the representative of the first administrator, for an account of the estate of the first intestate which came to the hands of his first representative.

The act of 1715, 1 Rev. Stat. ch. 65, sec. 11, barring creditors after seven years, does not extend to legatees.

The act of 1789, 1 Rev. Stat. ch. 65, sec. 12, will not protect the executor or administrator, even against a creditor, unless such advertisement be shewn to have been made as the act requires.

No time short of twenty years has ever restrained Courts of Equity from enforcing an account in favor of a legatee against an executor or his representatives.

The right to a legacy or a distributive share is not within the act of 1826, 1 Rev. Stat. ch. 65, sec. 14, declaring that ten years time shall be a presumption of payment or abandonment of a right of redemption on a mortgage, and of *other equitable interests.*

William Dailey made his will, and died in the year 1812. After a legacy to his wife, the will has this clause: "I lend to my son Samuel Dailey all the residue of my property, whether real or personal, till the age of twenty-one; if he should die before that time and I have no other child, I then give half my personal property to my wife Elizabeth Dailey; and the rest of my property, whether real or personal, to my relations on the part of my mother, in England, if any living. Their names were Thompsons, and James was the only living, and he single 20 years ago; a daughter was living, who married one Anderson, if they are to be found. If not, I give my property to John Salter, my wife's brother. But should my son live to the age of twenty-one years, then I give him every part of my property." Samuel Dailey, the son of the testator, died in the year 1816, under age. The executor of Dailey qualified to the will, and then died. Then Maurice Jones qualified as administrator *de bonis non*, with the will annexed. He surrendered his letters, and John M. Ovice, in the year 1815, was appointed administrator &c. on the estate of Dailey. Ovice,
[219] as was alleged in the bill, took possession of a large personal estate belonging to Dailey, and upon his death, in the year 1817, the defendant (Blount) became his administrator. The plaintiff, Salter, had become administrator *de bonis non* of Dailey; and, in that character, and also as a legatee under Dailey's will, filed this bill on the 25th of August 1831, to

have an account of the estate of Dailey, which came to the hands of Ovice.

Blount, the administrator of Ovice, in his answer, alleged that he had fully administered all the assets of his intestate; relied on the acts of Assembly, passed in the years 1715 and 1789, 1 Rev. Stat. ch. 65, sec. 11, 12, barring claims against deceased persons' estates. And he also relied on the great lapse of time which had taken place since he administered on the estate of Ovice, to the filing of the bill, as a bar to his being called on to shew his administration.

The act of 1715, ch. 10, sec. 9, 1 Rev. Stat. ch. 65, sec. 11, is in these words: That "*creditors* of any person deceased, shall make their claim within seven years after the death of such debtor; otherwise they shall be forever barred."

Badger, for the plaintiff.

Iredell, for the defendant.

Daniel, Judge, having stated the case as above, proceeded as follows: The plaintiff, in his character of administrator *de bonis non* of Dailey, cannot be regarded as a creditor of Ovice, because that character was acquired *after* Ovice's death; and besides, the act contemplates creditors having claims that might be enforced at the death of the debtor, whom it calls on to present these claims within seven years thereafter, under the penalty of being barred. In the plaintiff's character of legatee under Dailey's will, the act of 1715, 1 Rev. Stat. ch. 65, sec. 11, does not apply. The act declares, that the *creditors* of the deceased should make their claim within seven years. Legatees are not named in the act, and have never been considered as coming within the provisions of it. The defendant is not protected by the act of 1789, 1 Rev. Stat. ch. 65, sec. 12: for there is no allegation nor evidence, in the case, of such advertisement ever having been made, as is directed by [220] the act, to bar even a creditor.

The defendant also relies on lapse of time as a reason why the court should not now entertain the bill, and drive him to account with the plaintiff. No time short of twenty years, has ever restrained the Courts of Equity from enforcing an account

in favor of a legatee against an executor or his representatives. The case is not, we think, within the provisions of the act of Assembly of 1826, 1 Rev. Stat. ch. 65, sec. 14. That act declares, that ten years' time shall be a presumption of payment or abandonment of the right of redemption on a mortgage, and of *other equitable interests.* It seems to us, that the Legislature meant, by these words, such equitable interests as, previous to the passing of this act, were barred by time, in analogy to the statute of limitations in England, barring entries into land; such as constructive trusts in land, and other equitable interests of that nature. But we are of the opinion, that the right to a legacy or a distributive share was not intended to be comprehended within the phrase, equitable interest, as used in the act. If the Legislature had intended that ten years should be a bar to the recovery of legacies, or distributive shares, we think these would have been expressly mentioned in the act, and not left to be inferred from a general and vague sentence. But fifteen years had elapsed, from the death of Samuel to the filing of the bill. As it is possible, however, notwithstanding the fruitless inquiries made after the relations of Dailey, mentioned in his will, that they may yet be found, we deem it proper to direct a publication to be made, inviting them, if in existence, to come forward and assert their claim to the property in dispute.

We are of opinion, that the plaintiff is entitled to a decree for an account against the defendant.

PER CURIAM. Decree accordingly.

NOTE.—The acts of 1715, 1789 and 1826, (1 Rev. Stat. ch. 65, sec. 11, 12 and 14,) are contained in the Revised Code, ch. 65, sec. 11, 12, 13, 14 and 19.

That the claims of legatees and next of kin are not within any of the statutes of limitation, nor of the act of 1826, see *Bird* v. *Graham*, 1 Ired. Eq. Rep. 196; *McCraw* v. *Fleming*, 5 Ired. Eq. Rep. 348. Upon the doctrine of presumptions, see *Locke* v. *Armstrong*, ante 147, and the late case of *Davis* v. *Cotton*, 2 Jones' Eq. Rep. 430.

As to the necessity of advertisement by executors and administrators, see *McLin* v. *McNamara*, ante 82, and the cases referred to in the note.

JOHN MORRISON et al., Adm'rs. of BENJAMIN PERSON, *v.* NEIL McLEOD. [221]

NEIL McLEOD *v.* JOHN MORRISON et al., Adm'rs. of BENJAMIN PERSON.

If one, in whom a drunken man confides, takes advantage of that confidence and obtains from him an absolute conveyance for land, at an undervalue, with a special engagement for a re-sale and re-conveyance, upon hard and unreasonable terms, the contract will be set aside, and a re-conveyance decreed, upon the re-payment of the amount really due from the vendor to the vendee.

Where an absolute conveyance was made of land worth $3,000, for the expressed consideration of $2,000 then paid, but in fact only $500 was paid in cash, and the vendee's note given for the payment of the balance in four annual instalments without interest, and at the same time the vendee executed to the vendor an instrument in the form of a bond in the penal sum of $500 only, for the re-conveyance of the land upon the payment by the vendor to the vendee of the said sum of $2,000, with interest thereon from the date, at any time within *three* years; and that the former and his family might retain possession during the three years of so much of said land as might be necessary for them to cultivate; and just before the expiration of the three years, the parties executed another instrument in relation to said land, in which it was agreed, among other things, that the vendor might remain in possession one year longer, and that during that period, both parties, by mutual consent, would be permitted to sell said land; and if it should not be sold before the end of that time, "then *one* of the parties should sell *his interest* in said land to the *other:*" *It was held,* that the conveyance, though absolute in form, was intended by the parties to be but a security for the re-payment of money advanced, or to be advanced by the vendee to the vendor; and that the latter, upon the re-payment of the sum really due from him to the former, should be permitted to redeem the land.

John Morrison and Colin A. Munroe and wife, as the administrators of Benjamin Person, deceased, in March 1832 filed their bill of complaint against Neil McLeod, setting forth that the latter had obtained a judgment against them for $1,000, principal money, besides interest, on bonds of their intestate; that *they* had obtained judgments against said McLeod for six or seven hundred dollars, and were then prosecuting a suit against him, in which they expected to obtain a judgment; alleging that it had been agreed between said McLeod and themselves, that they should mutually forbear from issuing executions on their respective judgments, until [222] the pending suit should be decided; and that, when it should be decided, the parties should set off their respective

judgments against each other, and only the balance then remaining due on either side should be collected; complaining that McLeod, in violation of this agreement, had sued out execution on his judgment; charging that the said McLeod was in embarrassed circumstances, and that if he should be permitted to collect his judgment, it was very doubtful whether the plaintiffs would be able to collect theirs; and praying for an injunction and for general relief. Upon the filing of this bill an injunction was ordered as prayed for. The defendant, in September 1832, answered the bill, and therein denied that he had ever made the agreement charged against him in the bill; and further set forth, that some time in the year 1823, he executed to the late Benjamin Person a deed for the conveyance of a tract of land, for the consideration of $2,000, and the said Person gave him a bond to operate as a defeazance, on re-payment of the purchase money; a copy of which bond was annexed and referred to in the answer; that in truth the consideration was not paid at all, but the said Person gave the defendant his two notes for $500 each, being the same which the defendant had prosecuted to judgment, and two others of $250 each, and promised to let the defendant have the balance of $500 in sums as he should need it; that the said Benjamin afterwards prevailed on the defendant to surrender the two notes of $250 each, on a vague allegation that the accounts and claims which he had against the defendant were more than sufficient to extinguish these, besides paying the $500, for which no note had been taken; that the defendant blindly confided in Person's representations and in his promises that defendant should be credited for the amount of these notes, and that, at a convenient time, a full settlement should be made of all their dealings. The defendant further stated, that he never could get Person to come to this settlement; and that, with a view to coerce it, he instituted his action against Person on the two $500 notes; which action, after Person's death, was carried on against his administrators; averred that the claims upon which the administrators of Person had sued him, all of which claims,
[223] at the time of rendering the answer, were reduced to judgments, were in truth discharged by the surrender of the two $250 notes, or covered by the promise of Person to ad-

vance $500, as the same might be wanted; alleged besides, that in conscience the land conveyed was but a security for the amount, whatever it might be, which Person had actually advanced to him; that nevertheless, Person had taken possession of the land in 1827, as absolutely *his*, and had held the same ever since, making large profits thereon; that the said land was worth $3,000 or $4,000, and declared the defendant's purpose to file a bill to redeem the land and to have a full settlement.

In August 1833, McLeod filed his cross-bill against the administrators of Person, to which the heirs at law of Person were also made defendants. Therein it was charged, that on the 14th of May 1823, the complainant was seized of a tract of land situate in the county of Moore, worth upwards of $3,000; that he had theretofore been in the habit, whenever he visited the village of Carthage, the county town of said county, of taking up his residence with Benjamin Person, who kept a tavern there; that the complainant had an unfortunate propensity for drinking to excess, which was greatly strengthened by the facilities thrown in the way of its indulgence by the said Benjamin; that the complainant's intellect had become enfeebled by age and drunkenness, and his confidence in the said Benjamin, who was a keen, shrewd man, had become almost unlimited; that he owed Person an account; that he wanted money to meet some exigency and to pay off sundry small debts to different persons, and applied to the said Benjamin therefor, who expressed a perfect readiness to make any advances needed, if the payment of his account, and the re-payment of the money to be advanced, were secured by a mortgage on the said tract of land; that the complainant yielded his assent to whatever arrangements his supposed friend should think right for that purpose; and that, accordingly, certain instruments in writing were, on the day aforesaid, executed between them, which had been devised by the said Benjamin, under the pretence of carrying that purpose into execution; but as complainant believed, with the design of cheating him out of the land. The instruments thus executed were a [224] deed of bargain and sale from the complainant to the said Person, whereby, in consideration of the sum of $2000 therein acknowledged to have been paid by the said Person,

the complainant conveyed the tract aforesaid to the said Benjamin, in fee simple. There was also an instrument of the same date, executed by Person, in the nature of a defeazance, whereby it was testified, that on re-payment of the said sum, with interest, at any time within three years thereafter, by the complainant, to the said Person, the land should be re-conveyed. It was charged that in fact, and notwithstanding the declaration in the deed, no money whatever was actually paid to the complainant at the time, or ever afterwards; but it was understood that he was to have a credit of $500 with Person, on account of what complainant then owed him, or might owe, by reason of advances of money to or for the complainant; and Person executed four notes to the complainant, two for $500, and two for $250 each. The complainant further charged, that some time thereafter Person prevailed on him to surrender the two latter notes, on an allegation that he had paid moneys for the complainant, to such an amount as would, when added to his account, extinguish the said notes; and on a promise to have the matters between them fairly stated in his books, and to furnish the complainant with a full account; that said account was repeatedly demanded of Person in his life-time, but always evaded or refused; and averred that in consequence of these refusals the complainant brought the suit upon the two $500 notes, in order to bring about a fair settlement. The prayer of the cross-bill was, that an account might be taken of whatever advances had been made by the said Person for the complainant, and of whatever the complainant truly owed him on account, and of the rents and profits of, and waste committed upon, the said land since it came into the possession of Person; and that, upon paying whatever balance should be ascertained, the complainant might be let in to redeem, and for further relief. The defendant Morrison put in a separate answer,

[225] wherein the execution of the conveyance of the 14th of May 1823, and of the bond called the defeazance, was admitted; and wherein he stated that on that day the defendant, who had been several years acting as clerk to Person, was called into his store to witness certain writings, and that the complainant, Person, and Dr. R. B. McIver were present; that the defendant was then informed by Person, or

complainant, or both, (at all events both were present,) that Person had bought the complainant's plantation, and was to give $2000 therefor; that $500 were to be immediately placed to the credit of complainant, for the purpose of discharging his account with Person, and satisfying advances to be made by Person in discharging debts due from complainant to third persons; and the residue of the price was to be secured by four notes, payable in different years, two for $500, and two $250 each; that defendant and Dr. McIver thereupon witnessed the execution of the deed, of the four notes aforesaid, and also of another writing, which was then and there handed by Person to the complainant; but the nature, object and contents whereof were not stated, and were utterly unknown to the defendant; that at the time, he heard no intimation of the transfer being in any way conditional, or entertained any suspicion but that the sale was absolute; although, on seeing the instrument filed by the complainant as a defeazance, he is satisfied that this is the paper, the contents and nature whereof were unknown to him when he attested it, which was delivered by Person to complainant. The defendant further stated, that he had no distinct recollection of the complainant's condition at that time, as to his being *drunk* or *sober*, but said that defendant, when at Carthage, "was fond of strong drink, and *generally* much influenced by spirits, although not in a situation to disable him from transacting business, or to be called drunk in the general acceptation of the term." The defendant further said, that from the books of his intestate it appeared, that in November 1822 there was a balance due from complainant of $150, which was then closed by a note; that in June 1823 the defendant was credited in account with $500, "the first payment for land;" that on the 21st of March 1825 he was further credited with $250; and that, among his intestate's papers, he found the first of his intestate's notes for $250, with a receipt [226] of payment thereon, signed by the complainant as of that day; that it further appeared from the books, that after this credit of $250, there was a balance still due from complainant of $356 55, which balance was closed by his note; and that he had found among his intestate's papers, after his death, the other $250 note, with a memorandum in his intestate's

handwriting, that the same was paid in October 1826. The answer further stated that the complainant sued Person in his life-time, upon the two notes of $500, and after Person's death prosecuted the said suit to judgment against his administrator; and that they had sued him and obtained judgments upon the complainant's two notes of $150 and $356 55, before mentioned; had also sued him upon his open account, as appearing upon the books of their intestate, since the last settlement of 21st March 1825, for upwards of $500; but by reason of defect of proof, they thereupon recovered but $305 49 cts.; also had sued him on a note of complainant assigned to their intestate by Duffee, upon which they recovered $168 49 cents; and had brought several warrants against him before magistrates, out of doors, and obtained judgments in all for $50 or $60, principal money, besides interest. The two notes of $250, referred to, were exhibited with the answer. The defendant insisted that the instrument relied upon as a defeazance, was "literally" but a bond to reconvey, upon certain conditions; and that the complainant's only remedy was by a suit thereon, in case he had complied with the conditions—that the complainant was not an illiterate man, and "had been a man of business," and, as defendant believed, knew the meaning of the terms used in the instrument; and furthermore, that in the spring of 1827, the complainant voluntarily gave up the possession of the land to Person, removed to Montgomery, where he purchased another residence, and solicited Person to pay the bonds which he had given to Duffee upon that purchase.

The answer of Monroe and wife referred to that of Morrison, and, stating their belief of its truth, adopted it as their own. The heirs of Person, who were infants, answered by their guardian, and submitted their rights to the protection of the Court.

Replication was filed to these answers, and the cause
[227] and cross cause were brought to a hearing upon the proofs.

Winston and *Badger*, for the plaintiffs.

W. H. Haywood and *Mendenhall*, for the defendants.

Gaston, Judge, having stated the pleadings as above, proceeded as follows: The controversy between these parties de-

pends mainly on the matter put in issue by the pleadings on the cross-bill. In regard to this, though many depositions have been taken, the only material facts established by them for the present purpose are, that the complainant in the cross-bill was much addicted to intoxication; that he very often visited Carthage, habitually every Court, and when there, lodged with Person, and *was generally drunk.* The witnesses differ as to the effect produced on him by drunkenness, some expressing an opinion that he could not be cheated when drunk, and one, Mr. Dowd, declaring that in *his* judgment, it rendered him exceedingly stupid, and an easy prey to a shrewd man, in whom he reposed confidence. Person was a man attentive to business, intelligent and exact, and possessed the confidence of McLeod and the community in general. The tract in question was well worth $3000. The complainant was a man disposed to run in debt, and to evade the payment of his debts by disingenuous means.

To these facts are to be added the very material facts disclosed by the exhibits. It is to be regretted that these have not been as full on either side as they might have been rendered. We could have wished to see the two $500 notes that were reduced to judgments, and also a copy from the books of the deceased of the complainant's entire account therein. We are satisfied that they have not been withheld to prevent the ascertainment of truth; nor do we draw any unfavorable inference because of their not having been produced. They would have shed light, however, on parts of the transaction, over which hangs some obscurity.

From the exhibits it is to be collected, that Person executed to McLeod, in May 1823, as the consideration in part of the alleged purchase of the land in dispute, four notes, payable, according to the defendant Morrison's representation, in four different years, that is, as we understand him, in [228] 1824, 1825, 1826 and 1827. Two of these notes are produced, each for $250, one of which became due in May 1825, and the other in May 1827; and we are left to infer, and so take the fact to be, for the present, that the two notes of $500 each severally became due in 1824 and 1826; although, from the statement in the answer of McLeod to Morrison's bill, in

September 1832, wherein he claimed to be due thereon, for principal and interest, the sum of $1320, we suspect that neither became due earlier than 1826. The only other part of the consideration was a credit of $500, to be allowed to McLeod in account. The most favorable representation for those who set up the transaction as an absolute purchase, then, is, that the land was bought for $500 cash, and $1500 to be paid in four annual alternate instalments of $500 and $250, without interest—that is, for about the sum of $1800 cash. But, accompanying the conveyance, and executed with it, is the instrument called by the defendants a bond for a re-conveyance, but alleged by the plaintiff to have been executed, or at least *represented*, as a defeazance. It is one of an extraordinary character. It is a bond from Person to McLeod, in the penal sum of $500 only; and after reciting that the latter hath, on that day, conveyed the land in question to the former, in consideration of the sum of $2000, to the latter in hand paid, "*but to be reconveyed*, on condition that he shall, at or before the expiration of *three* years from the date, pay to Person the aforesaid sum of $2000, with interest from the date," it declares, that in case McLeod shall fail to comply with the conditions above mentioned, at the time above prescribed, the obligation shall be void; but, in case of a compliance by him, or his lawful representatives, and the said Person, or his heirs, executors and administrators, shall then refuse to re-convey, that the obligation shall be in full force; and it further provides, that McLeod and his present family shall be permitted to retain possession of so much of the land as may be necessary for them to cultivate, "during the aforesaid term of three years, given for the re-payment of the purchase money."

Subjoined to this instrument is another, in the following words: "Agreement between Neil McLeod, Esq. and
[229] Benjamin Person, the said Neil is, within some short time, to deliver to the said Benjamin, *this* instrument of writing, and *three* notes or bonds which he holds against the said Benjamin, two of them for $500 each, and the other for $250, making in all $1250; at which time the said parties are to enter into the following agreement respecting the within described land, viz: the said Neil is to remain in possession

until the 1st of June 1827, on paying the interest of the purchase money to the said Benjamin; during which time both parties, by mutual agreement, will be permitted to sell said land; and the profits arising therefrom, after paying to the said Benjamin the purchase money, with interest, agreeably to contract, to be equally divided between the said Neil and Benjamin; and in case such sale shall not have been effected at the expiration of the time above mentioned, then *one* of the parties shall sell *his interest* in said land to *the other*, he offering the highest price to be the purchaser, on complying with the true spirit and meaning of the contract to be entered into," dated May the 12th 1826. In October 1826, Person gets a surrender of the note for $250, but under what circumstances does not appear, and in the summer of 1827 takes possession of the land.

It seems to us, that the complainant in the cross-bill is entitled to the relief he asks for. Either the contract between the parties was for an absolute conveyance of the land, and a special engagement for a re-conveyance, as defendants insist is literally testified by the instruments—or, it was for a conditional conveyance of the land, to compel the payment of money due, and the re-payment of money to be advanced. If the former, the contract must be set aside, as one unconscientiously extorted from a drunken and confiding man, upon his paying what may be justly due; and so, he is entitled to redeem. If the latter, then in its nature it is but a security for a debt and loan, and therefore he is entitled to redeem.

Viewed in the first light, the contract bears unequivocal marks of having been obtained by imposition. The land was unquestionably worth $3000, and it is bought at the nominal price of $2000. Not a cent of money is actually advanced, but a credit is to be allowed McLeod in the tavern and store of $500, and the remaining $1500 of the price is to be paid [230] in instalments, one of which, at least, is not to become due until four years after the transaction. It is a declared condition of the sale, that the vendor may re-purchase, by *returning* the $2000 with interest from the date, within *three* years—that is to say, by *returning* the price, with interest, *before* he is entitled to receive the price. And, if he shall faithfully execute this condition on his part, and restore the so called purchase

money, and interest, within the three years, and Person choose to keep the land and money so restored, he may do so on paying $500. If this was really the bargain made by Person, with his old drunken friend, it is not surprising that he was desirous to conceal it even from his own clerk.

We are not bound, however, to take this view of the transaction, and charity should induce, while justice will permit us, to regard it as in truth but an awkward attempt to pledge the land, as security for what was due, and the money to be advanced. For this purpose, a conveyance was made of the legal title to Person, the creditor and intended lender, and McLeod, the debtor and borrower, received an instrument stating the *conditions* of that *conveyance*. Witnesses were called upon to notice the true amount of the present debt, and the extent of the future advances contemplated and secured by Person's notes, in consideration whereof the conveyance was made; but the *conditions* of that conveyance were not disclosed to them, but intended to be declared in the instrument given to the party, to claim the benefit of them. Whatever appearances the transaction might wear before the witnesses, and however Person might desire, in order to save him the trouble or expense of a foreclosure, that its full character should not be known to them, he might have supposed this paper reasonably sufficient to shew McLeod's right to redeem; and in case that right were not exercised, or if it were abandoned, that the surrender of the paper would be all that was necessary to make the conveyance indefeasible. He would thus, indeed, have the staff very much in his own hands; but, notwithstanding, he might intend to render or allow to McLeod what upon the whole he should deem just. The agreement of the 12th of May
[231] 1826, although certainly not free from obscurity, and in one particular not intelligible, furnishes strong evidence that the deed of conveyance was not intended to be absolute, but designed as a security. The three years allowed for redemption were on the eve of expiration. But $750 of the moneys, whether due on account or contemplated to be advanced, had been received. The re-payment of *this sum* was not convenient, and another plan for securing it to Person was to be adopted. The notes for the remaining $1,250 were to be

returned, and no further advances made. McLeod was to reside on the land another year, paying interest on what had been advanced; and during that year the land was to be sold, and the money advanced (still, indeed, called the purchase money,) was to be restored. The stipulation therein in regard to the equal division of the *profits* of the *sale*, is indeed wholly unintelligible; but there is a distinct recognition, notwithstanding all that had passed between the parties, that nevertheless, each yet "had his interest in the land," which might be the subject of a sale, either from one to the other, or by both to third persons.

Regarding the conveyance of the land as having been made to secure to Person what was then due, or might thereafter become due to him, from McLeod, we do not find any such advised surrender or abandonment of the right of redemption arising thereon, as to justify us in rejecting his claim to redeem.

It will be declared, therefore, that the complainant in the cross-bill has a right to redeem the land in question, upon paying what may be found justly due from him to the estate of Benjamin Person; and, to ascertain that amount, there must be a reference to take an account of all debts contracted with the said Benjamin by the said complainant, and all moneys advanced to or for him by the said Benjamin, for the securing of which the conveyance was made; and also an account of the rents and profits received from the said land, and of the waste, if any thereon committed, by the said Benjamin, his administrators and heirs, saving to him and them all just allowances; and for the more effectually taking of these accounts, the commissioner is to be empowered to receive testi- [232] mony by depositions or examine witnesses, and also to examine the parties on interrogatories, and to compel the production of books and other documents.

PER CURIAM. Decree accordingly.

NOTE.—See the case of *Calloway* v. *Witherspoon*, 5 Ired. Eq. Rep. 128, where it was held that, if, when a man is so near drunk as to render him an easy prey to the fraudulent designs of another, an unfair advantage is taken of his situation to procure from him an unreasonable bargain, a court of equity will interfere and rescind the contract, not on the ground of his drunkenness, but of the fraud.

ABRAM C. McRAE *v.* ROBERT McKENZIE, Ad'mr. of JOHN F. PHIFER.

One partner cannot be charged with all the debts of the firm, simply upon the ground that the books were in his possession, and without any evidence of any special undertaking that he would collect the debts. He should be charged with only what he collected.

Where no settlement or statement of company accounts between the partners appears, the interest of each partner in the funds is only an equal share after all debts are paid, and after each has accounted for what he has already received. This, therefore, involves the taking all the accounts of the partnership, as well of the debts it owed as of those owing to it, and every thing else material to stating a proper profit and loss account; for it is only such balance as may appear upon that account, that is to be divided between the partners, and carried to their respective accounts in the books, and thereby show how they stand towards each other. Therefore, the report of the master, upon a reference to him to state an account of the partnership, merely ascertaining the debts due to the firm, and dividing them equally between the partners, will be erroneous.

The bill charged that a mercantile co-partnership existed from 1818 to 1821, between the plaintiff and the defendant's intestate; and that upon the dissolution, debts were owing to the firm from various persons to the amount of $1380 83, according to a list annexed to the bill: that the books of accounts and other evidences of debts were taken by Phifer into his possession, upon an agreement that he would collect those balances and account with, and pay over to, the plaintiff one-half of the said debts, as they should be collected; and that Phifer did collect the whole, or might have done so with ordinary diligence, before he died, in 1828. The prayer was, that
[233] an account might be rendered by the defendant of such sums as the intestate collected, or ought to have collected; and that the plaintiff should have a decree for the payment to him of the one-half thereof.

The answer admitted the partnership; but denied all knowledge of the debts owing by or to the firm, or of the capital stock, or of the profits made, or of the possession of the books and evidences of debt by the intestate, as alleged in the bill, or what sums the intestate collected; or of any agreement that the intestate should collect the debts, or that the money that

might be collected on the debts should be equally divided between the partners. It said, on the contrary, that the defendant had reason to believe that his intestate owed the plaintiff nothing, as, at his death, he held the plaintiff's note for $350, dated January 27th 1823, and received payments thereon in 1827 and 1828; and that if he did collect any money, it was applied to the debts of the firm, or accounted for to the plaintiff. The defendant stated that such papers as he found amongst his intestate's, in the name of the firm, he delivered to the plaintiff.

Upon references to the Master, he, by his reports, found an account of good debts owing to the firm at the dissolution; that there was no proof of any agreement that Phifer should collect the debts, except that he had the books, nor that each partner should have one-half of the debts; but upon the facts that the books were in Phifer's possession, and that the two were equally interested in the store, the Master charged him with all the sums due from solvent debtors, and then divided the amount equally between the partners.

Barringer, for the plaintiff.

D. F. Caldwell, for the defendant.

RUFFIN, Chief Justice, having stated the case as above, proceeded as follows: The defendant hath taken several exceptions to the reports, which need not be particularly passed on, as one or two of them are founded on principles fatal to the whole report.

The Master has erred in holding Phifer liable for all the debts, simply upon the ground that the books were in his possession, and without evidence of any special [234] undertaking that he would collect the debts. The books must necessarily be under the immediate care of one of the partners; but that does not confer on that partner peculiar powers on this subject, nor make it more his duty than the other's to collect. Phifer could, therefore, properly be charged with only what he collected.

It is also erroneous to divide the funds, in whatsoever hands they may be, into two equal parts, without taking further ac-

counts. Such a division assumes that the partners themselves owed nothing to the firm, or sums precisely equal; that there were no debts owing by the firm; and that the debts owing to the partnership, when the business was stopped, were all profits. Those assumptions are manifestly unfounded. As the plaintiff has not proved any settlement or statement of company accounts between him and his partner, the interest of each partner in the funds is only an equal share after all debts are paid, and after accounting for what he had already received. This, therefore, involved the taking all the accounts of the partnership, as well of the debts it owed, as of those owing to it, and every thing else material to stating a proper profit and loss account—for it is only such balance as may appear upon that account, that is to be divided between the partners and carried to their respective accounts in the books, and thereby shew how they stand towards each other. The Master says, indeed, that there is no proof that there were debts outstanding against the firm. But, it does not appear that he examined the books with this view, or even interrogated the plaintiff on the point. Besides, there is evidence which renders it highly probable that the firm did owe money. Mrs. Young says that Phifer borrowed of her $700, on the 27th of January 1823, and proposed to give for it the note of Phifer and McRae, but she preferred his own note, and he gave it. Now, on that very day, the plaintiff gave his bond to Phifer for half that sum. These circumstances render it highly probable that the money borrowed was for the use of the firm; and hence it is also probable that the credits on the plaintiff's note were, in whole or in part, for his share of the moneys collected by Phifer. However that may turn
[235] out, it is manifest that justice cannot be done, until all the accounts of the partnership and between the partners themselves be taken, instead of taking merely a list of balances due the firm. The reports proceed, therefore, upon wrong principles throughout, and must be set aside; and a new reference ordered, to take all the necessary accounts, as herein indicated.

PER CURIAM. Order accordingly.

NOTE.—As to what is necessary to be stated in an account made for the purpose of having a settlement of the partnership, see *Philips* v. *Turner*, ante 123, and *Jones* v. *Jones*, 1 Ired. Eq. Rep. 332.

MARTHA BENBURY et al. *v.* RICHARD W. BENBURY, Adm'r. of JOSEPH N. HOSKINS.

If property be conveyed by deed to a trustee for certain purposes, and he join in the execution of the deed by signing and sealing the same, and expressly covenant therein for the performance of certain acts, a breach of trust by him will create a debt by specialty to the *cestui que trusts;* and, *it seems,* it would, were there no express covenant on his part to perform the duties imposed by the deed; but if he only accept the deed without joining in its execution, by signing and sealing it, a breach of trust by him will be only a simple contract debt; and in the administration of his estate on his death, such debt will be postponed to debts by specialty.

Where a trustee misapplies the trust funds and dies, the *cestui que trusts* will, in equity, be entitled to have such assets of his estate as are not covered by debts of superior dignity, laid out or settled, under the direction of the court, to the purposes declared in the deed of trust.

In the view of a Court of Equity, all debts are of equal dignity, because all debts are equally due in conscience. But it is not so at law, and a Court of Equity, in decreeing payment by an executor or administrator of a debt of his testator or intestate, must respect the order of preference established at law, for, otherwise, it might compel him, who is liable only by reason of the assets in his hands, to pay the debt of the deceased out of his proper goods.

A party taking under a deed, is bound to do what in the deed is required of him, but if the deed be not executed by him, it is not an obligation under his seal, and an action of *covenant* will not lie against him for a breach of it.

On the 22d of August 1835, by an instrument declared to be an indenture, and to have been made between Richard W. Benbury of the first part, and Joseph N. Hoskins of the other part, but which purported to be sealed, and was in fact sealed by the said Benbury only, the former, in consideration of the sum of $5 therein acknowledged to have been paid unto him by the said Hoskins, conveyed unto the latter a certain tract of land, to have and to hold unto him, his heirs and assigns forever. The deed then proceeded to declare that the land was conveyed upon the following trusts, namely: "that the said Hoskins is to sell the above tract of land, at such [236] time, and upon such terms, as to him may seem meet; he is to make good and sufficient deed or deeds to the purchaser from him; and to apply the proceeds of the sale in the following manner; first, he is to pay all the existing debts of

the said Richard, at the time of the sealing of the deed; he is to receive the balance, and to hold it for the joint benefit of the said Richard and his wife Martha, during their joint lives, and afterwards for the benefit of the survivor of the said Benbury and wife Martha; and after the death of the survivor of those two, he is to transfer the said proceeds or the property purchased therewith to the children of the bodies of the said Richard and wife Martha, and to their heirs forever; the said Hoskins is to be permitted to apply the above mentioned balance of the proceeds as he pleases, always applying the interest or profits arising therefrom to the benefit of the said Richard and his family, in the manner and order above described." In pursuance of this deed, and in a few months after its execution, Hoskins sold the land to Joshua Skinner for the sum of $10,875, of which $5000 was paid on the 1st of January 1835, and the remaining $5,875 was secured by notes drawing interest from the 1st of January 1836; and these notes, after they became due, were fully paid to the said Hoskins. In the Fall of 1838, Hoskins died intestate, having applied the sum of $4,674 89, in full discharge of all the debts of Benbury mentioned in the deed, and having misapplied the surplus of the proceeds of the said land to his individual purposes. Benbury, in November 1838, administered on the estate of Hoskins, and immediately thereafter this bill was filed against him. The plaintiffs were his wife Martha and their infant children, suing by a next friend, and they claimed to have the amount of the trust funds, so misapplied, paid out of the assets of the defendant's intestate, and prayed for the appointment of a new trustee; and that the money, when paid, might be laid out or settled under the directions of the court, in conformity to the purposes declared in the deed of trust. The material allegations of the bill were admitted in the defendant's answer, who also acknowledged,

that he had in his hands assets of his intestate sufficient
[237] to satisfy the claim of the plaintiff; and declared his desire to apply these assets to the satisfaction of that claim, if he could do so consistently with his duty as administrator; but he stated, that he was advised that, in law, the specialty debts of his intestate were entitled to a priority over this claim; and that if this were so, then there would be, in his hands, but

the sum of $2000, applicable to the satisfaction of simple contract debts. The cause came on to be heard upon bill and answer.

Heath and *Devereux*, for the plaintiffs.

No counsel appeared for the defendant in this court.

GASTON, Judge, after stating the allegations contained in the pleadings as above, proceeded as follows: The plaintiffs, in this case, are not pursuing the proceeds of the land sold by the trustee, and seeking the aid of a Court of Equity to secure their application to the trusts declared in the deed, but are demanding satisfaction out of the estate of the trustee, for a breach of trust in the misapplication of those proceeds. The *cestui que trusts* are creditors of the trustee, and of his estate, to the extent of the money so misapplied. In the view of a Court of Equity, all debts are of equal dignity, because all debts are equally due in conscience. But it is not so at law, and a Court of Equity, in decreeing payment, by an executor or administrator, of a debt of his testator or intestate, must respect the order of preference established at law; for, otherwise, it might compel him, who is liable only by reason of the assets in his hands, to pay the debt of the deceased out of his proper goods. It is a rule of the common law, that debts due on bonds, covenants and other instruments, under the seal of the party, shall be paid by an executor or administrator, before debts due by simple contract. This rule has been so far modified by the acts of our Legislature as to place debts due by "notes and bills, not under seal, and signed accounts," in the privileged class of specialties; and, with this modification, it is the settled law of the State. The question before us then, is, whether the claim asserted by this bill is to be regarded as a debt due by specialty?

If Hoskins had joined in the execution of the deed, and had expressly covenanted for the performance of [238] the trusts therein declared, there can be no doubt but that the demand against his estate, because of misapplication of the proceeds which came to his hands from the sale of the land conveyed by the deed, would have been "a debt by specialty," within the meaning of this rule. This is settled by many adjudications. —— v. *Casey*, 2 Wm. Black. Rep. 965;

Plumer v. *Marchant*, 3 Bur. Rep. 1380; *Benson* v. *Benson*, 1 P. Wms. 130; *Mavor* v. *Davenport*, 2 Sim. 227, (2 Con. Eng. Ch. Rep. 395.) If he had but joined in the execution of the deed, without an express covenant for the faithful performance of the trusts, we think the instrument, in its present form, would have sufficiently shown a covenant on his part to do the several matters therein set forth as to be done by him—namely, to sell the land, to execute titles, to apply the proceeds, in the first place, to the payment of Benbury's debts, to hold the residue during the lives of Benbury and wife, and the life of the survivor, for the purposes declared; and, after the death of the survivor, to pay them over to their children. An indenture is a mutual agreement between the parties thereto, solemnly testified by their seals, and speaking in the name of all of them. And, as a covenant is but an agreement under seal, by which one person engages with another that some act hath or hath not been done, or that some future act shall or shall not be done, any declaration in an indenture that one of the parties thereto is to do certain things therein mentioned, is a declaration of his agreement to that effect, authenticated by his seal. But this instrument is not an indenture; for it does not purport to be sealed, nor is it sealed by the trustee. It is, therefore, the deed of Benbury alone—a declaration by him to all mankind, informing them that he thereby conveys the land to Hoskins, for the purposes therein set forth. If Hoskins has made an agreement, or entered into an engagement with Benbury, in relation to the subject-matter of that conveyance, *he* has not testified that agreement or engagement under his seal; and, therefore, it is not secured by *his* deed.

It would seem thus to follow, that the debt asserted for the plaintiffs is not a debt by specialty, and, therefore, [239] must be postponed to those which by law are included in that class. But the counsel for the plaintiffs has contended that it is established by authority, that an action of covenant might be brought upon this deed against Hoskins or his representatives, because, by acceptance of the estate conveyed, he bound himself to the performance of the duties enjoined by the deed, as effectually as if, in the most formal manner, he had sealed and delivered the instrument as his deed. Nothing,

certainly, can be more plainly just, than that a man who accepts a benefit, conferred upon any reasonable conditions, should not be permitted to enjoy the benefit and reject the conditions. His acceptance of a gift, thus qualified, is an assent to the qualifications of the gift, and he is bound *by that assent.* But it is not an assent testified by *his deed;* it is an assent testified by his act of acceptance; and the remedy for breach thereof—if the conditions be of a nature which a court of law can notice—must be such as the law provides for breaches of agreement, or of duty consequent thereon, in cases of agreement not by deed. The *dicta* referred to in the argument have all been so thoroughly examined, and so fully explained, in a late learned work, Platt on Covenants, 10, (1 Law Library, 5,) highly commended in 1 Chitty's Plead. 135, as to save us from the necessity of noticing them particularly. They are undoubtedly correct, to the extent of asserting the obligation on a party taking under a deed, to do what in the deed is required of him; but they are incorrect in supposing that an action of covenant will lie against a party, who, without executing the deed, has availed himself of a benefit under it. If there be any cases in which this may be done, they are of a peculiar kind, and are special exceptions from the general rule.

There can be but few cases of conveyances in trust, other than by deed. If the doctrine contended for by the plaintiffs were correct, a debt by specialty would arise in every instance of a breach of trust, in one taking under a deed. Nothing is clearer, upon authority, than that this position cannot be sustained. A breach of trust, generally speaking, creates a debt by simple contract only. *Gifford* v. *Manly*, Cas. Temp. Talb. 109; *Vernon* v. *Vawdry*, 2 Atk. 119; *Bartlett* v. *Hodgson*, 1 [240] Term Rep. 42; and *Townsend* v. *Windham*, 2 Ves. sen. 4, 7. We cannot, therefore, grant to the plaintiffs the full relief asked by the bill; but they are entitled to relief to the extent of the assets in the hands of the defendant, not covered by debts of superior dignity. It is obviously proper that a new trustee should be appointed, and the money secured to the trusts expressed in the deed; and we think it right that the costs of this suit should be paid out of the assets in the hands

of the defendant, declared liable to the satisfaction of the claim of the plaintiffs.

PER CURIAM. Decree accordingly.

NOTE.—As to the main question of the dignity of the plaintiff's claim, see, in support of the decision, the case of *Bateman* v. *Latham*, 3 Jones' Eq. Rep. 35.

That an instrument containing mutual stipulations, signed and sealed by one party and not the other, will be a covenant as to the first and a simple contract as to the second party, is settled. See *Kent* v. *Edmonston*, 4 Jones' Rep. 529.

As to the distinction between the nature and application of legal and equitable assets, see *Green* v. *Collins*, 6 Ired. Rep. 139.

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[241] JACOB BUFFALOW *v.* JOHN BUFFALOW et al.

The principle upon which Courts of Equity interfere, in cases of unequal agreements between attorney and client, extends equally to agreements between a party to a suit before a single magistrate before whom attorneys do not appear, and his friend and confidential adviser in such suit. Hence, an absolute conveyance of all his property, worth at least $1000, upon the consideration of supporting him during his life, obtained by a nephew from his uncle, a weak and very infirm old man, upwards of sixty years of age, while the nephew was acting as the pretended friend, adviser, and agent of the uncle, in a suit brought by warrant before a single magistrate, to recover from him the penalty for trading with slaves, about which the uncle was under much anxiety and alarm, and obtained too without the old man's having an opportunity to consult his friends or advise with counsel, will be set aside, and a re-conveyance decreed upon the payment to the nephew of what had been advanced by him.

An agreement entered into with a weak old man, by which he makes an absolute assignment of his whole estate upon the consideration of the assignee's personal covenant to maintain him for life, out of the profits of the estate, is, of itself, without reference to any confidential relation between the parties, or to any state of anxiety and alarm in which the assignor may be, liable to much animadversion, and, without explanation, imports undue advantage.

A donee claiming under a voluntary conveyance from one who obtained his title by fraud and surprise, will be affected by the same equity which may be enforced against the donor.

It is a mark of fraud that the assignee, in a grossly unequal agreement made between persons standing in a confidential relation to each other, alone gave directions to the counsel who drew the instruments, and that the assignor had no opportunity of consulting or advising with the counsel.

The validity of an agreement does not, in ordinary cases, depend on each or either of the parties having an attorney, nor is the intervention of any third party ordinarily requisite. But, in a suspicious agreement between a shrewd man on the one hand, and a very weak one on the other, the counsel who is

called upon to draw the instruments ought to have an opportunity to see the weak man, receive his directions, or, at least, understand his situation and views, and provide properly against advantage being taken of him, and for the permanent security of his rights under the agreement.

The bill was filed in August 1833, by Jacob Buffalow, the administrator and heir at law of Steele Buffalow, deceased, for the purpose of having certain deeds made by him to John Buffalow declared void, as having been fraudulently procured, or that they should stand only as a security for what might be found to be justly due to John Buffalow, upon the transaction between the parties.

The bill stated, that the plaintiff's late father was seized in fee of a tract of land, containing fifty acres, on which he resided, in Wake county, and was also the owner of four negroes and some other personal estate, such as furniture and stock. That he had never more than a very ordinary understanding, when his habits of life were regular and good; and that in the latter part of his life, he became much addicted to drinking, and that, about the period of the transactions complained of, his habits of intemperance were confirmed and inveterate, and his health impaired from those causes and old age, he being then about the age of seventy; and that he was thereby rendered utterly unable to manage his business with discretion, and but little, if at all, removed from strict legal incapacity of mind. That, while in that state, the defendant Hutchins, and one Utley, commenced suits, by way of warrants, against him, for an alleged trading with slaves, and also preferred indictments therefor. That the other defendant, John Buffalow, was the relation of Steele Buffalow, and affected to be his friend; that he was a man of much acuteness and speculating turn, and succeeded, by professions of regard and other artifices, in insinuating himself into the good opinion and entire confidence of the other, as a friend and agent, capable of serving, and willing to serve him, in the management of the said business, for which Steele had no skill himself. That John Buffalow, finding Steele greatly agitated and alarmed, represented that the prosecutions would be successfully carried on, and impressed upon his mind, that they would result in his ruin, and leave him without the means of support in his old age.

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That, availing himself of terrors thus produced by him, or perceived to exist, John offered himself as his friend, and proffered to secure him against all the suits, and to provide him a suitable maintenance for the residue of his life, if Steele would convey to him his land and slaves, and other property. That Steele, with alarms thus excited by artful suggestions operating on his weak and decayed mind, embraced the insidious offer, and, on the 7th day of October 1831, conveyed his whole property to the defendant, John Buffalow, who soon after took possession thereof, and conveyed the land to the other defendant Hutchins; between whom and John Buffalow the suits were in some way settled.

The bill then stated, that in the belief of the plaintiff, the warrants and prosecutions were instituted in consequence of some understanding between the two defendants, to speculate upon the alarms of Steele Buffalow, and divide the spoils; or, if mistaken therein, that the negotiation of John Buffalow was commenced and carried on in concert with the other [243] defendant, upon an agreement implied or expressed, that Hutchins should take the land as his share, and the other defendant keep the residue of the property.

The bill then charged that, at all events, and if the two defendants did not unite in the active perpetration of the fraud as alleged, yet, from the relations between the parties as kinsmen and friends, and as principal and agent, professing to interpose from affectionate consideration of the other's afflictions, incapacities and distresses, and from the surprise and undue advantage in procuring the conveyances from one in the condition of said Steele, they ought not to stand in this court. The bill further charged that Hutchins did not pay any valuable consideration for the land, and also had notice of all the matters affecting the transaction between Steele and John Buffalow.

The bill further stated, that Steele Buffalow died intestate, about six months after the deeds were procured from him, and left the plaintiff his only child and heir at law; to whom also letters of administration on the personal estate had been granted.

The answer of John Buffalow admitted the conveyances at the time charged in the bill, and that Steele Buffalow, who was his uncle, was then between 60 and 70 years of age: that he was

not a man of any remarkable powers of mind, or discretion, but was a man of ordinary capacity in his youth, and, at times, addicted to intemperance, but denied that he was legally incompetent to transact business.

The answer then stated that this defendant resided in Raleigh, and Steele Buffalow a few miles off; that on the 6th day of October 1831, the uncle came to the defendant's house and told him that judgment had just been rendered against him for $100, as a penalty for trading with a negro: Immediately afterwards, a constable came to the house, and served two other warrants on him for the like penalties, at the suit of one Utley, who was also the plaintiff in that which had just been tried; and "the said Steele invited this defendant to go with him before the magistrate, as he might require some surety to prevent him from being put in jail; and the defendant went, and the magistrate continued the cases for the absence of a witness." At that time, also, the defendant Hutchins, as [244] prosecutor, preferred three bills of indictment for the same offences in the Superior Court, which were found by the grand jury. The answer of Buffalow positively denied any agency, directly or indirectly on his part, in causing the warrants or indictments to be instituted. It stated that the first he, John, knew of them, was from Steele himself; and "that, on the 7th of October 1831, of his own head, he proposed to this defendant that he would convey to him, as his absolute property, the land and four negroes, if this defendant would bind himself to pay all the just debts of the said Steele, and support him during his life. This defendant at first refused to do so; but, after being persuaded, he consented, and the deeds were drawn"—which were exhibited with the answer. One of them was a deed of bargain and sale for the land, expressed to be made in consideration of $100; and was drawn by a gentleman of the city, not a professional person. A second was a bill of sale for the four slaves, expressed to be in consideration "of an agreement this day sealed and delivered by John Buffalow to Steele Buffalow, by which the said John hath agreed to support and maintain the said Steele during his natural life, and to pay all the debts justly owing by the said Steele; and in the further consideration of one dollar." A third was in these words:

"Know all men by these presents, that for and in consideration of the conveyance of four slaves to John Buffalow, by Steele Buffalow, the said John, for himself and his heirs, doth covenant and agree with said Steele as follows, to-wit: that the said John will pay off and discharge all debts now justly owing, or that may become due hereafter on contracts now existing, if such there be, so that the creditors of said Steele shall in no manner harass the said Steele—the said Steele, however, consenting that the said John may, at his own expense, resist all demands which he may consider unjust, and be allowed the benefit of all legal or equitable set offs, with any of the creditors of said Steele: Further also, that he, the said John, will comfortably maintain and support the said Steele, as a boarder at the house of said John, during the life of said Steele, and decently clothe him, provide for him all necessary medi-
[245] cal aid and attendance during sickness; and, if the said John die before the said Steele, then he will provide for his maintenance, support and comfort, as above stated, in the family of the said John Buffalow:" which was signed and sealed by the defendant, John. The three deeds were attested by the same witness; and the answer stated that the two latter were drawn by counsel, according to the proposition of said Steele; and that the covenant from John to Steele Buffalow was deposited with the gentleman who attested the instruments.

This answer further stated the value of the slaves to be about $800, and of the land to be about $100: that Steele was guilty of the offences charged against him, as the prosecutors could have proved, and as he admitted to this defendant; and that his other debts exceeded $200: that this defendant became immediately responsible for fees of attorneys, to defend the said suits and indictments, and became liable to meet the judgments that might be rendered thereon.

This answer further stated, that a day or two before the 12th day of October 1831, this defendant met with said Utley, and told him of the agreement, and asked him to compromise the warrants; and he agreed to do so, if this defendant would give him the tract of land of 50 acres; and, thereupon, this defendant accepted the offer, and the warrants were compromised—the said Utley declaring that he would not do so, but for the

sake of personally accommodating this defendant; and on the 12th of October 1831, the said Utley stated to the defendant that he had sold the land to John Hutchins, and directed the defendant to convey to Hutchins, which was done. At the Spring Term 1832, of the Superior Court, Steele Buffalow was sick, and could not attend; but, in his absence, this defendant, on his behalf, pleaded guilty, upon the agreement of the prosecuting officer to claim only the costs; which the defendant paid.

The answer further stated, that in November 1831, at the proposal of the present plaintiff, the defendant agreed to board with the plaintiff, his father, said Steele, at $50 *per annum*, and the charges for medical attendance to be paid by the defendant; and said Steele was willing and desirous that the arrangement should be made. Steele Buffalow died [246] on the 27th of April 1832, at the plaintiff's.

The answer then admitted that, in the event, the bargain had been a gainful one to the defendant; but insisted that he incurred the risk of its turning out a losing one, and that he ought to have the benefit of it in this Court. It denied "that this defendant made any particular or extravagant assurances of affection for his said uncle, to insinuate himself into his good graces, or that he used any art or persuasion to prevail on him to make the agreement; but said, on the contrary, that said Steele made the proposition, and pressed it on the defendant. The defendant used no means to alarm or excite the fears of the said Steele, about said suits or indictments, or told him that he would lose them, as he knew nothing more than what said Steele himself told him, namely, that he was guilty. This defendant positively denied that said Steele was intoxicated when he signed the deeds, or when he made the agreement, or that the defendant furnished him with excessive quantities of ardent spirits afterwards. On the contrary, the contract was of the suggestion of said Steele himself, and was freely made by him, when perfectly sober and capable to transact business."

The answer of the other defendant, Hutchins, stated no material fact different from those set forth in the other answer, except that this defendant, after he was informed by Utley of he compromise between him and John Buffalow, agreed to purchase the land from Utley, and paid in money and liabili-

ties "assumed for said Utley to the value of the said land." It admitted that this defendant was prosecutor in the indictments, and that after they were preferred, Utley told him that he intended to take out the warrants; in which this defendant encouraged him. But he averred that there was no concert in any of those transactions between John Buffalow and himself, or Utley, as far as he knew; and that he was induced to interfere or act as he did, not for the purpose of getting any of Steele Buffalow's property, but solely to prevent the ruin of his slaves, by means of the trading which he believed Steele Buffalow carried on with them.

The deed to the defendant Hutchins was exhibited;
[247] and it was dated the 10th day of October 1831, and was attested by the same gentleman who witnessed the instruments between the two Buffalows.

The parties proceeded to take testimony; and among the depositions on file, were those of the gentlemen who drew the papers and attested them. One of them stated that he had but little knowledge of Steele Buffalow; that he and John Buffalow came to him together, and jointly requested him to draw the instruments: that he drew the deed for the land, but advised the parties to get counsel to put the other papers into proper form; that John Buffalow did so, and brought them back, when they were all executed by the parties and witnessed by him; that only one other person was present; and that Steele Buffalow was not drunk at the execution of the deed, nor did he manifest symptoms of a disordered intellect.

The gentleman of the bar, who drew those papers, stated that Steele Buffalow was not before him, nor known to him: that John Buffalow stated the advice given them, to have the papers drafted by counsel, and that he had accordingly applied to him; that he drew the instruments agreeably to the instructions of John Buffalow, who took them, when prepared, and carried them to be executed where the other persons were waiting for him.

It was also sufficiently established by the proofs, that Steele Buffalow was then sixty-two years old, of little mental capacity, and that little much impaired by habitual intemperance, to the extent of drunkenness, whenever an opportunity offered; that

he had the rheumatism badly, and was very infirm for his age, and unable to labor. There was also testimony that Steele Buffalow afterwards expressed himself to be satisfied with the arrangement, and at other times to be much dissatisfied.

The evidence not being satisfactory on some other questions of fact, the Court directed the Master to make certain inquiries; and in the report it was stated, that the negroes were worth $785, and the land $100: that the hire of the slaves, for seven years average, was worth $25 per annum, and the annual rent of the land $25 more: that Steele Buffalow also made, at the same time, to John Buffalow, another conveyance (not mentioned in the pleadings) for a mare, some hogs, corn [248] and fodder, and indifferent furniture, being all the property Steele Buffalow had; of which John left with the present plaintiff a part, and took the residue himself, to the value of about $60: that John Buffalow represented the debts of Steele, paid by him, to amount to the sum of $268 70; but had offered no proof thereof: and that the annual expense of maintaining Steele, in the manner stipulated in the contract, would be $145 or $150.

The Master also reported, upon the evidence of the gentleman who witnessed the deeds, that from his appearance at that time, the probable duration of the life of Steele Buffalow might be from ten to fifteen years.

Devereux and *Badger*, for the plaintiff.

W. H. Haywood, for the defendants.

Ruffin, Chief Justice, after stating the case as above, proceeded as follows: It was said by the counsel for the defendant, that the argument against him rests upon the assumption that all such transactions are fraudulent, rather than upon proof of any fraud in this case. To the Court, however, it seems, that both upon a general principle of presumption against such dealings, and upon the particular circumstances of this case, the plaintiff must be relieved.

There is very little doubt as to any material fact. It may, however, be remarked in the beginning, that the Master must be mistaken in reporting the value of the fee in the land at

$100, for he himself makes the rent for only seven years $175. The ground also for deeming Steele Buffalow's life good for 10 or 15 years is unsatisfactory. Only one witness thinks so, and he had but little knowledge of him, and judges only from his appearance when the deeds were executed. Several others, who knew him well, describe his age, habits and state of health in such terms as establish a moral improbability that his life would endure much beyond the period it had then attained; which was, indeed, the ordinary limit of human life. It is apparent that this man's was almost as poor a life as could have been selected.

It is quite plain that this affair arose on the sudden, out of the legal proceedings instituted against the plaintiff's [249] father, and that the contract was not deliberately considered by him or by any one for him; but that he was drawn into it, or suffered to run into it, without advice of counsel or consultation with friends, excepting only the very person to whom the conveyances were made, and who then had the entire confidence of the donor, and all the influence over him which such confidence in a friend, near relation, adviser and agent, would produce in a weak and distressed man. The case, we think, is within the policy which corrects under-hand agreements between attorney and client.

It is not pretended that such an arrangement had been thought of before the 6th day of October 1831. There was no dissatisfaction between the plaintiff and his father, and no previous purpose of the latter to advance the nephew in exclusion of the natural object of his affection. On the day mentioned, the old man came to town on a visit to his nephew. As soon as he arrived, his difficulties commenced; and he naturally had recourse to his nephew for advice and assistance. While engaged in relating what had occurred, two other warrants are served on him, and he is informed of three indictments being found. Being instantly taken before the magistrate, and in dread of imprisonment, he requested, or, as the answer has it, "invited" his relation to attend and assist him. Can it be doubted that the uncle was deemed, or, at least, felt himself incapable of contending with his adversaries, and that John Buffalow went for the purpose of managing the cases before the magistrate, or

settling them with the party? A single fact, if there were nothing else, suffices to bring us to that conclusion. It is the fact disclosed in the answer, that the accused confessed his guilt to his nephew. Why? Not by way of appeasing the opposite party or of satisfying justice; for then it would have been disclosed to the magistrate. It was, then, to John Buffalow, as a competent and confidential friend, that he might understand the whole case, and be the better qualified to advise a defence or settlement. A confidence thus gained, and for such purposes, brings the case within the reason of the rule alluded to. It is true, these persons did not literally bear the names of attorney and client, but they did substantially. The ca- [250] ses were triable before a justice of the peace out of Court; before whom attorneys do not appear. But services to be rendered there, similar to those of a professional man in Court, invest the person from whom the services are to come, with the character of solicitor, for the purposes of the rule. This man had influence to gain the secret of his uncle, and thus held him in subjugation; and the secret must have been imparted with a view to the more advantageous conducting of the business. There was, then, in fact, a relation of employer and agent between these parties, under circumstances in which much confidence would probably be placed, and entire confidence was actually placed, by the former in the latter. The rule on which the Court interferes between attorney and client would be a lifeless skeleton, unless animated by a principle which will enable it to embrace all cases of the abuse of the like confidence. Had an attorney drawn a client into the agreement during the continuance of the relation between them, or as a condition of undertaking his case, there could be no hesitation to annul it. We think it would be equally mischievous to allow this defendant to retain the advantage he has attempted to gain. The Court must be watchful against contracts inconsistent with the fidelity that ought to characterize all the intercourse between one who undertakes for another, who is dependent on his skill and integrity. There are many circumstances in this case which shew it to be a proper one for the application of the principle; for it seems to us that these conveyances were obtained upon

an inadequate consideration, and by surprise, from a very weak man, who thought himself secure in the hands of a friend.

In the first place, it is a matter of some astonishment, that we do not find any evidence of Steele Buffalow's guilt of the offences imputed to him. It is true that there is a plea of guilty on the records of the indictments. But the answer admits that was not the plea of Steele Buffalow, but was pleaded by his nephew, for him, and while he was on his death-bed. We cannot assume his guilt, without some evidence of it; and taking him to have been innocent, the defendant's case is, indeed, barefaced.

But supposing him to be guilty, there would remain [251] insuperable objections to the transaction. The defendant does not establish any debts owing by the donor, or even if the answer be looked at, on this point, only to the amount of about $200. Then the consideration of the deed was, substantially, the maintenance of the uncle, during the short remnant of his days—that was, in reality, almost nothing; he died in six months. For that, the defendant took absolute conveyances of *all* his uncle's property, without leaving in him the right to any thing, in any event; and the value of the effects thus conveyed must have been at least $1000. It is an obvious remark, that the maintenance of the old man actually cost the nephew only at the rate of $50 a year; and, therefore, would be satisfied by the annual profits of the property. But it is said that the maintenance, as stipulated for by the defendants, was worth $150; and that the change was at the request of the uncle, and, therefore, no violation of the agreement. If so, it is the stronger evidence of incapacity and surprise. The defendant, in the very next month after the agreement, sent his father back to the plaintiff, to whom he was to pay $50; and with this, the father and son are represented to be satisfied. It shews how easily they were persuaded to let the defendant pocket two-thirds of the sum, at which, as a consideration for the agreement, he had estimated the board the previous month; or that the father and son, if left to themselves, each preferred living with the other, though in the more homely manner of the country. As the matter was actually managed, the transaction is one in which the consideration of the conveyances is the personal agreement of the donee, to maintain the donor out

of the annual profits of the property conveyed. An agreement of that sort, without any reference to the confidential relation between the parties, or to any state of anxiety and alarm in which the donor was, is, in itself, an object of much animadversion. It is so easy to procure assignments from those who, from decrepitude, mental weakness, and dotage, must have some one to lean on, and are dependent for their comforts and opinions on those around them, as to render vigilance an indispensable duty of the court against imposition in cases of this kind, and to call for evidence that the agreement [252] was reasonable and prudent; that it had been duly weighed by the party subject to imposition, and had been approved of, or at least known to, the nearest members of his family. At the first blush, such a transaction, without explanation, imports undue advantage; for, in effect, one party gets the estate for managing it during the life of the other.

In the case before us, there is not a single circumstance in favor of the defendant's conduct. There was no deliberation nor opportunity for it, on the part of the donor, nor of consultation with his son and heir apparent. He left home one day, without a thought of any such arrangement, and, on that day, and the next, the business was begun and brought to a close, upon terms which left him no home, and reduced him to being a pensioner, dependent on his nephew. The answer says, it was a proposal of the uncle, of his own head, and that the defendant at first refused, and at last reluctantly consented, after being repeatedly pressed; and therefore it insists that it was a voluntary act of the uncle, and while he was sober. We have no thought, after reading the evidence, that Steele Buffalow was actually intoxicated, when he executed the instruments before the gentleman who attested them; nor is it doubted, that he was willing, at the moment, to sign them. But it cannot be believed, that the act was voluntary in the sense in which a court of conscience uses that term, namely, that it was an unbiassed act, deliberately assented to, after being fully understood. There is no evidence to those points; and we can hardly imagine any sufficient to establish them. Not a witness saw these two men together, heard a word between them, until the defendant took his uncle to a gentleman to ask his assistance in drawing

the deeds. Then, no doubt, he was willing to sign them. But our inquiry is, how was he rendered thus willing? Did he become so from the action of a competent, collected judgment of his own, or from the prudent counsels of friends disposed to consult his interests? The evidence clearly proves, that Steele Buffalow, though not *non compos*, was always of weak mind, and that it was much impaired. In the hurried state of
[253] his feelings at that time, he could not judge for himself —he was entitled to the aid of his friends; and the defendant ought not to have dealt with him until he had such aid. There was no person to propose terms on the part of the donor, and his interest was wholly neglected. There is, in this case, every circumstance on which the case of *Clarkson* v. *Hanway*, 2 Pr. Wms. Rep. 203, was decided, and many others also. When John Buffalow went to counsel to get the deeds drawn, he does not even request the other party to accompany him. He simply gives directions for the preservation of his own interests. If the other had also gone and placed himself in the hands of the counsel, such papers as these could never have been drawn. The donor is, by them, simply to have life sustained. There is no selection of the place of residence reserved to the donor, no fixed sum allowed, but it is left vaguely open to evasion and litigation, when the donor will have no funds to go to law upon; and the support, thus provided, is secured only by the personal covenant of the nephew. We would by no means say, that the validity of an agreement is thought by the court to depend on each or either party having an attorney; or that the intervention of any third party is ordinarily requisite. In this State, most persons bargain for themselves, and put their agreements into writings themselves. But this man must be acknowledged to have been incompetent for that. When an attorney, as the common one of both parties, was engaged to draw the instruments, there ought to have been an opportunity afforded the counsel to see the weak man, receive his directions, or, at least, understand his situation and views, and provide properly against advantage being taken of him, and for the permanent security of his rights, under the agreement. When this was not done, and the party's son was also kept in the dark, until the property had been irrevocably con-

veyed; and it is found that the agreement, as procured, was unequal and unreasonable, and that the interest of the vendor, under it, is vague and uncertain, and even that insufficiently secured; there is no rational conclusion left for our adoption, but that the weak and distressed man has been drawn into such an agreement by fraud and surprise; and that, on those grounds, he must be relieved, by holding the convey- [254] ances to be only a security for what has been done under them.

The defendant Hutchins must abide by the fate of his co-defendant, through whom he derives his title. There is no proof that he *paid* the purchase money he says he agreed to give Utley. That person did not pay any thing either. He says the land was to be conveyed by way of compromising the warrants. But they were not evidences of debts against Steele Buffalow; for only one had been tried, and the judgment on that was annulled by appeal. It is remarkable, too, that this is another feature of imposition on the gentleman of the bar, who drew the other instruments; for *they* do not speak of the land or other property conveyed, except the negroes; and no doubt he was told that the slaves formed the entire consideration for the stipulations on the part of John Buffalow, or was not told that there was any other.

Upon the whole, therefore, the plaintiff is entitled to an account of the sums paid for his father, and of the value and profits of the slaves and their increase, and of the land and other property; and, upon payment of the balance, to have a re-conveyance.

PER CURIAM. Decree accordingly.

NOTE.—The doctrine of the courts of equity upon the subject of setting aside conveyances obtained by one person standing in a confidential relation to another, is fully discussed and considered in the case of *Deaton* v. *Munroe*, 4 Jones' Eq. Rep. 39.

Neither weakness nor old age alone, without fraud, will invalidate an instrument. *Smith* v. *Beatty*, 2 Ired. Eq. Rep. 456; *Suttles* v. *Hay*, 6 Ired. Eq. Rep. 124. Nor will mere inadequacy of price, unless it be such as amounts to apparent fraud, or the situation of the parties be so unequal as to give one of them an opportunity of making his own terms. *Potter* v. *Everitt*, 7 Ired. Eq. 152. Proof of partial imbecility, combined with undue influence, will invalidate a deed as well as a will. *Amis* v. *Satterfield*, 5 Ired. Eq. Rep. 173.

A purchaser for value from a grantee affected with actual fraud, gets a valid title, unless he has notice of an existing unpaid debt, or of a debt subsequently contracted before he makes his purchase. *Toole* v. *Darden*, 6 Ired. Eq. Rep. 394.

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[255] JOHN A. CHAFFIN et al. *v.* NATHAN CHAFFIN, Junior.
NATHAN CHAFFIN, Junior, *v.* JOHN A. CHAFFIN et el.

In a suit for an account, if the plaintiff examine the defendant before the master, upon a reference to him, and read his examination on the hearing, the answers to the interrogatories, so far as they are responsive thereto, will be evidence for the defendant, though subject to contradiction, upon the same principle that his answer to the bill is evidence for him.

If the same person be executor of one, and the administrator of the other, of two partners, he cannot retain the assets of the latter to satisfy the claim of the former, arising out of the losses of the firm, in preference to the specialty creditors of the latter; because the claim of the former is but a debt by simple contract. Nor can he be made accountable to the legatees of the former for not retaining against the simple contract creditors of the latter, when the books of the firm did not shew, and he had no other means of knowing, that the firm had sustained losses and was insolvent before it was settled.

Whether one, who is executor of one person and administrator of another, can retain the assets of his intestate to the full amount of a debt due to himself from such intestate's estate, in preference to a claim of equal dignity against such estate due to his testator, or whether the assets should be applied in whole or in part to the debt due to the estate of his testator, *Quere? It seems*, that in such case he would not be permitted to take care of himself to the exclusion of his testator's estate; but that he should divide the assets rateably between himself and such estate.

Where a partnership is dissolved, and one of the partners retires, and the remaining members form a new co-partnership under the same name and style, and afterwards a note is given in the name of the firm, by one who was the active partner in both concerns, it will not be presumed to be for an outstanding debt of the old, instead of a debt of the new firm, without some evidence of the fact. And the master, in stating an account of the debts of the new firm, is not bound to state an account between the two concerns, when the parties do not furnish him with any *data* on which to found it, and the books do not show that there were any dealings between them.

A note given to a retiring partner, after the dissolution of an old and the formation of a new firm, by the remaining partners in the same name, is *prima facie* the debt of the new and not of the old firm; and if the partner who gave it were the active partner in both concerns, this presumption is strengthened by the fact, that by giving such note, he binds himself to pay a larger proportion of the debt.

A settlement by one, of his accounts with a co-partnership, will not be presumed to include his accounts with an individual member of the firm.

It is no ground of exception to a master's report, that he has not acted upon matters not embraced in the reference.

By an original and amended bill, brought by John A. Chaffin, George H. Chaffin and Mary Chaffin, it was charged that Nathan Chaffin the elder, and his two sons, Nathan Chaffin the younger, and William W. Chaffin, entered, in the year 1812, into a mercantile partnership, under the firm of W. W. Chaffin & Company, carried on at Huntsville, in Surry county, under the particular management of William W. Chaffin, one of the partners; and that the co-partnership continued until it was dissolved in February 1823, by the death of the father, Nathan the elder; and that large profits were made in the business; and that each of the partners were entitled to one-third part thereof. The bills further stated that Nathan the elder left a will, in which he appointed the plaintiffs, John A. Chaffin and the said Nathan the younger, and William W. and two others, the executors, of whom the said John A. and Nathan the younger alone took probate. That by [256] the will, the testator bequeathed several specific legacies mentioned, to his wife, the plaintiff Mary, and also devised certain lands and bequeathed certain slaves and other chattels to the plaintiffs John A. and George H., and then directed the sale of two tracts of land for the payment of his debts. The testator then gave the residue of his estate, in certain proportions, to his sons and daughters, of whom John A. and George H. were two, and William W. and the defendants were the remainder.

The bills then stated that the testator left a large personal estate, consisting of his share in the said partnership and of specific articles and debts; and that Nathan Chaffin the younger took the estate into his possession and disposed of the two tracts of land directed to be sold, and all the personalty, except the slaves bequeathed to the plaintiffs, John A. and George H., who took them into possession, as legatees, by the consent of said Nathan the younger; and that the assets, thus in the hands of the said Nathan the younger, were of much larger amount than the testator's own debts, or any for which his estate ought to be liable. That in March 1823, the said William W. Chaffin

died intestate, and that administration of his estate was also taken by Nathan Chaffin the younger, who reduced into possession his estate to a large amount. That, as surviving partner of the firm of W. W. Chaffin & Co., the said Nathan the younger also took into his hands, or might have collected, effects sufficient to discharge all the joint debts, and leave a large surplus for division among the partners.

The bills then charged, that Nathan Chaffin the younger gave out, that the separate estate of W. W. Chaffin was insufficient to pay his separate debts, much less any part of the debts of the firm: that he also gave out that he, Nathan the younger, was not a member of the co-partnership, and that the effects of the firm were insufficient to pay its debts; and that, after applying all the assets of the firm, a large balance of their debts remained unsatisfied, for which he alleged the estate of his testator to be liable; and that, for the satisfaction thereof, he had applied the legacies to the plaintiff
[257] Mary, and other parts of the personal estate, except the slaves bequeathed to the other two plaintiffs. And as to them, the bills charged that a creditor of the firm had obtained judgment against the plaintiff John A., and the defendant Nathan, as executors of the testator, of which the beneficial interest was in the defendant Nathan, by assignment to a trustee for him, who had caused an execution to be levied on the said slaves, so bequeathed to the plaintiffs, and threatened to sell them. The bills prayed an account of the estate of his testator, and that the legacies to the plaintiffs might be made good, and the residue distributed according to the will: that if the said firm should be found to be insolvent, the defendant Nathan might be declared to have continued a partner up to the death of the testator; and that said defendant and William W. Chaffin might each be held liable for an equal third part of the deficit; and that the defendant Nathan might be held bound so to administer the estate of his intestate, William W., that it might be applied thereto.

The material parts of the defence, set up in the answer of Nathan Chaffin the younger, were, that the co-partnership formed in 1812 (of which he admitted himself a member,) was dissolved on the 8th day of May 1818, by agreement between

the partners: that he then received merchandise to the value of about $2000; and that the other two partners received together to the value of $4000, and then entered into a new business, in which Nathan the elder and William W. were the sole partners, under the same firm and name of W. W. Chaffin & Co., which continued until the death of the said persons. The answer stated that up to May 1818 the business had been profitable, though no account had been stated, from which the profits might appear: that the books were retained by William W. Chaffin, who had been the active partner in the first firm, and was also such in the second, for the purpose of settling the business by collecting the debts owing to the concern, and paying those owing by it; after which he was to divide the surplus among the partners: that William W. collected the assets and paid all the debts thereout, as the defendant believes, from the circumstance that no person had, as a creditor of that firm, preferred any claim against him: that he frequent- [258] ly called on William W. for a statement of the concern, as he was satisfied that money was coming to him on it, and that William W. did not pretend to deny the truth of his claim, but deferred the matter upon various pretexts.

This answer then stated an account of the administration of the estate of William W. Chaffin, and also an account of the last concern of William W. Chaffin & Co., whereby it appeared that the separate debts of William W. would not be paid by his separate estate, and that the joint funds would not satisfy the joint debts of the partners, but that a large balance remained to be paid out of the estate of the testator, and that all the legacies would be required for that purpose, besides the fund provided in the will for the payment of debts.

Pending the preceding suit, Nathan Chaffin the younger filed his bill against John A. Chaffin and George H. Chaffin, and therein stated the devises in the will of the testator of the two tracts of land to be sold for the payment of the debts, and of the lands and slaves to the defendants respectively; that the executors, Nathan and John A., exposed the two tracts of land for sale, and sold one tract; but that John A. bid off the other, and refused to concur in a sale thereof, and had possession of it; that he had sold the land devised to him, with the view of

defeating the creditors of his testator, and particularly his co-executor, Nathan.

The bill then stated the administration by this plaintiff of the assets of his intestate, William W. Chaffin, and of the firm of W. W. Chaffin & Co.; and that, after exhausting all those funds, a large sum remained unpaid of the debts of the firm, for which the estate of the testator was liable; and that the same had been paid by the plaintiff, or were then reduced to judgments against the executors, whereby all the assets of the testator had been exhausted, and it was rendered apparent that it would require the whole estate of the testator, personal and real, to satisfy the debts so paid or so outstanding. This bill prayed that all the proper accounts might be taken; that the tract of land bid in by John A. might be re-sold; and that the legacies and devises to the two defendants might be declared liable to, and disposed of for, the satisfaction of the said unpaid debts.

The answers in substance set forth, as defences, the
[259] matter alleged by these defendants in the bill brought by them.

The causes were heretofore heard; and the court, upon the proofs, declared the co-partnership, of which the defendant Nathan Chaffin the younger was a member, to have been dissolved on the 8th of May 1818, as stated in the answer. It was then referred to the master to take an account of the testator's estate, and of the administration thereof by the defendant Nathan, including the interest of the testator in, or liability for, the firm of W. W. Chaffin & Co.

The master reported that the debts of W. W. Chaffin & Co., paid by the defendant Nathan, amounted, over and above the assets of that firm that came to his hands, to the sum of $4909 64; of which the one-half was immediately chargeable to the testator's estate, and the other half would be so chargeable, unless paid by the estate of William W. Chaffin. In order to ascertain how much of the loss that estate could pay, the master then proceeded to take an account of the estate of William W. Chaffin, and found that it had been fully administered in the discharge of his separate debts, and indeed, that a balance of $620 25 was due to the administrator. In the account of the estate of Nathan Chaffin the elder, therefore, the master

charged to that estate the whole loss of the co-partnership; which, with the interest thereon, made a balance in favor of the executor of $5951 62. To the report, the original plaintiffs, and the defendants in the second bill, excepted. Upon the taking of the accounts, the other parties examined Nathan Chaffin the younger, upon interrogatories as to many of the points to which the exceptions related.

Devereux and *Winston*, for the plaintiffs.

Badger, for the defendant.

RUFFIN, Chief Justice, having stated the case as above, proceeded as follows: The first exception is, that in stating the accounts of W. W. Chaffin & Co., the master has improperly allowed the defendant Nathan, for the payment of sundry debts specified, amounting to $7,900 44, as the debts of the last firm, whereas they were the debts of the first firm, of which he (Nathan the younger) was a member. In connexion [260] therewith, the same parties except, secondly, that the master has not, but ought to have, stated accounts between the two co-partners, instead of assuming that all the outstanding debts were due from the second; and should have required the defendant Nathan to file a statement of the balances of debts due by each of the firms, as he had the custody of their books.

The first exception is unsupported by the proofs, and must therefore be overruled. Upon looking into the evidence, there could not be the least doubt that all the debts are properly those of the second firm, excepting only two items of $556, and $1356 03. The other debts are upon bonds and notes given in the name of W. W. Chaffin & Co., long after the year 1818, and, in most instances, shortly previous to the deaths of the partners in 1823. Being pressed by that circumstance, the counsel for the exceptants have endeavored to shew that there were outstanding debts of the first firm, when Nathan the younger retired; and thence to infer, that some of the latter debts were contracted to raise funds for the discharge of the former. But the inference is too forced to be acted on by the court, in the incidental manner now required—especially as in most of the cases, besides the presumption from the dates of

the securities, there is direct proof that the debts were for money loaned, or goods sold, to the second firm. In addition, it is to be remarked, that the books of accounts of both firms are produced before the master, and from an inspection of them, it does not appear that the second paid any money, or assumed any debt, for the first; for there is not even an account raised between them. The defendant Nathan, also, in his examination upon the exceptant's interrogatories, states explicitly his belief, that every debt of the old firm was paid out of its effects, collected by the managing partner W. W. Chaffin; above all, it is in proof, by witnesses, that Nathan Chaffin, the elder and younger, both claimed to be entitled to profits made in the first business, and called on William W. Chaffin to state an account of that business, and pay to them their shares. This he neglected to do; but, at no time during the five years
[261] that elapsed between the dissolution and his death, did he intimate to the other partners that there was a loss on that business, or claim any thing from the defendant Nathan on that score; but, on the contrary, clearly admitted the contrary, by paying large sums on Nathan's personal account with both firms. With the exception of the two items already specified, the first exception must therefore be overruled. So also must the second exception, for the same reasons. It is not true that the master has assumed any thing in favor of the first firm; for there is no evidence that any of the debts ought to be charged to that firm; nor was he bound to state an account between the firms, when the parties did not furnish him with any data on which to found it; and the books, as already mentioned, do not profess that there were any dealings between them. If such an account were material to the exceptants, they ought to shew it, and make out their view of it from the materials, thus as much in their power as the master's. Nor was Nathan Chaffin bound to do more than deposit the books in the office, for the use of the other party, since he founded no charge upon them.

With respect to the two sums of $556 and $1,356 03, not yet disposed of, a reference to the evidence somewhat more particular, is requisite. The former sum is claimed by Nathan Chaffin the younger, on a note made to himself by W. W.

Chaffin & Co. on the 25th of January 1823. The latter is for a sum paid to the Bank of Cape Fear, being the balance of a debt that had existed for some years, and due upon the note of William W. Chaffin, endorsed by the defendant Nathan and another person, as sureties; which debt is alleged by the defendant to be really the debt of the last firm of W. W. Chaffin & Co. Upon the nature of these two debts, the exceptants examined the party, Nathan Chaffin, minutely before the master; and in his answers to the interrogatories, he gives a particular, and, as far as can be perceived, a consistent and credible account of them. It is, that he had an account with each firm for his personal dealings, consisting of purchases of merchandize on his part, and of sales of tobacco and other produce to the stores; and that he had, besides, made cash advances for the first firm, before 1818, to the amount of about [262] $8000, which was reduced by returns of cash to about $5000, when he retired; that he, Nathan, owed a debt to the bank of about $2000, which it was agreed, some time after 1818, the new firm should assume, and for the amount charge him in account; and that the same was then added to the existing debt of the firm at bank, and a note given for the whole, in the name of W. W. Chaffin, but really for the firm. That afterwards, viz: on the 25th of January 1823, this defendant settled with William W. Chaffin his personal accounts in both firms, and thereupon found a balance due to him, upon the whole settlement, of $556, for which W. W. Chaffin & Co's note was given to him. In this settlement, he admits, were included the balance due on the note of $8000, and also debts from him to the old firm of $4,105 63, as appears in their books. The residue consisted of his dealings in the new firm and of the bank debt aforesaid. In this statement, this defendant is supported by an inspection of the books of both firms, so far as respects the amount of his personal dealings, and that entries were made therein by W. W. Chaffin himself, of the date of the settlement. But the books are very imperfectly kept, and do not shew the particulars of the settlement; nor contain an entry of either note to Nathan Chaffin the younger, nor of the charge of the sum assumed for him at bank. But the transactions at bank appear, by the testimony of the Cashier, to

have been correctly stated by the defendant in all respects, except that the Cashier does not know whether the debt due upon the note of William W. Chaffin was his own debt or that of the firm. But upon that point, a person who was a clerk in the store states that he understood the money went to the use of the firm, and that the debt was theirs, although no entry was made of it. Moreover, John A. Chaffin, one of the original plaintiffs, who had also been a clerk in the store, and was one of the executors of his father, Nathan the elder, paid out of the assets of his testator a part of that debt, as being a debt for which his testator was liable.

Under these circumstances, the Court must regard the allowance of these sums as credits of the defendant Nathan, in the disbursements of the assets of the firm, as proper. The
[263] form of the instrument makes it *prima facie* evidence of the sum of $556 being a debt by the new firm. The presumption is fortified by the fact, that it was against the interest of W. W. Chaffin to make it a debt of the new firm, if it were really not so, as it made him liable to pay one-half instead of one-third of it; and there is no reason to suspect him of a design to do injustice to his father for the sake of his brother. The same conclusion with reference to the other sum of $1,356 03 could not have been reached, perhaps, with the same entire satisfaction, had not the exceptants examined the party before the master, and read his examination on the hearing. It has been thus made evidence for him, so far as it is responsive to the interrogatory, in the same manner and upon the same principle that the defendant's answer is evidence for him. In suits for accounts, it is impossible the pleadings can put every matter precisely in issue; and therefore, when the parties go before the master, the plaintiffs may help out their bill by special interrogatories to the other party. But then the interrogatories must be looked at in the light of being particular charges supplemental to those more general ones of the bill; and so the responses are, in this sense, to be transferred to the answer, and made evidence in the cause, though subject to contradiction. With the whole of this evidence before us, there can be no doubt of the justice of this item as well as the others. The whole of the first exception must therefore be overruled; as also

must the ninth exception, which is specially confined to this sum of $1,356 03, as being the own proper debt of Nathan the younger, or of William W. Chaffin, and not the debt of either firm.

The third exception is unfounded. The defendant Nathan has filed an account of the assets of the second firm that came to his hands, amounting to the sum of $3,122 40; upon which the master has based his account current between that defendant and W. W. Chaffin & Co.

The two next exceptions, 4th and 5th, assume that there was a loss on the partnership, and insist that the defendant Nathan should have retained, out of the assets of his intestate, William W., for the amount of the debt of the intestate to the father, in respect of such loss, and pleaded the same in bar of the creditors of William, or, as administrator of William W., [264] confessed judgments to the creditors of the co-partnership and pleaded the same in bar of his intestate's separate creditors, so as to give the estate of the testator, Nathan the elder, the aid of the assets of William W. in paying the debts of the firm.

There are several reasons why these exceptions cannot be sustained. In one view, the exceptants suppose, that as executor of the father the defendant might have retained of the assets of the brother, to make good the debt to the former on account of the losses. If this be admitted, it can avail the exceptants very little; for the claim of the father's estate upon the son's would be but a simple contract debt, and all the separate debts paid or retained out of the assets of William W. Chaffin were due upon specialties, except the sum of $369 79, paid in the life-time of William W., by the defendant Nathan, as his surety by note. The truth is, however, that the executor did not, and could not know—as far as appears to us—that his testator would be a creditor of his intestate upon the settlement of the business, nor that the assets of the firm would not discharge all its liabilities. Upon inspecting the books, they appear to have been so wretchedly kept, that no person could ascertain the state of the business from them, or know to whom the firm was indebted, or how the accounts between the partners would stand:- There is in them no stock account, cash account, profit

and loss account, merchandize account, or an account of any creditor of the concern. They simply consist of accounts against persons to whom goods were sold, and of the payments made therefor. The consequence was, that it was only after all the debts of the firm were paid and the business adjusted, that it did appear or could appear to the executor, that a retainer by him out of the assets of the intestate would be necessary for the security of the testator's estate. Those two exceptions are, therefore, overruled also, except as to the before-mentioned sum of $363 79. As to that sum, an interesting question is presented, which the state of this case will, perhaps, make it unnecessary to decide, as, probably, over and above that, the debt of the testator's estate to the party, Nathan the younger,
[265] will exceed the value of the assets which he can reach.

That question is, whether, inasmuch as this is a simple contract debt, the money retained out of the assets of the intestate on that account can be kept by Nathan exclusively for his own use, or ought not to be applied in whole or in part towards the claim of the father's estate, which is of the same dignity. We incline to the opinion, that he who undertakes the office of executor is not at liberty to take care of himself to the exclusion of his testator's estate; and that the money in the defendant's hands ought, at least, to be rateably divided between them. For, admitting that the separate estate of a partner must first pay his separate debts, yet the debt of one partner against another, in respect of a loss in the joint business, when ascertained, is a separate debt; and, therefore, the claim of the testator, and of the defendant, as to this sum of $363 79, stand, in all respects, on the same footing. For the reason already mentioned, the question as to this particular sum is reserved for the present.

The 6th and 8th exceptions present, in different forms, substantially the same questions that have been already decided. In taking the account of the assets of the firm, in the hands of the defendant, he is *charged* with the sum of $1528 72, as the debt of the testator, for his personal dealings with the firm. Of course, the defendant must be *credited* with the same sum in his account with the testator. This does no injustice; for, by the insolvency of the firm and of the other partner, the father

has become the firm in respect to creditors, and those entries are nothing more, in fact, than cross entries. So of the sum charged to the testator as the share of W. W. Chaffin of the losses of the partnership, it must be said, that the objection is, only as to the manner of the master's stating it. In substance, the report charges to the testator all that his executor paid for the firm, after exhausting the assets of the firm; and that is clearly right, when it is ascertained that the other partner is insolvent. The 6th and 8th exceptions are therefore disallowed.

The 10th exception embraces several items of retainer by Nathan the younger, against the estate of his intestate William W. Chaffin, amounting in the whole to $3,052 30. As to the sums of $389 61, $107 56, $96 09, $250 69 and [266] $430 00, parts of that larger sum, the court thinks the credit supported by plain and satisfactory vouchers, namely, notes and bonds of the intestate to the defendant Nathan. It was said that there was a presumption that these debts were included in the settlement of the 25th of January 1823 on which the note for $556 was given. But the presumption is to the contrary, as that was the note of W. W. Chaffin & Co., and these are the private debts of William W. Chaffin alone. The other items, however, require explanation, and they will be referred back to the master for further inquiry.

One is for a note, dated the 15th December 1821, for the sum of $339, payable six months after date to N. Chaffin, without saying Senior or Junior, and witnessed by A. H. Chaffin. It is objected to, because it is torn in two, and was probably cancelled, and because it was included in another note, of the same date, for $402, payable a year afterwards, to Nathan Chaffin, administrator of Peter Dowell, and also witnessed by A. H. Chaffin. The defendant, on his examination, stated that the note for $339 was given for a negro, sold by him as administrator of Dowell, and that the clerk of the sale, A. H. Chaffin, took and delivered it to him, in its present condition, saying, that he tore the paper as it is, in separating it from other writing on the same sheet. That statement is supported by the testimony of A. H. Chaffin. This may be so, and probably is, from the circumstances that there are different sureties to the two notes, and that they are payable at different periods, ac-

cording to the credit on which the negroes and other parts of the property were sold. But it is not usual for persons to give two bonds at the same sale, and nothing is said by the witness of the bond for $402; and, therefore, it will be more satisfactory to have the subject re-examined, so that it may appear from the account of sales, or the sureties to the notes or otherwise, that the two notes were really given for different debts.

Another doubtful item is, the sum of $1,062 50, claimed on a transaction of this sort: In October 1822, Nathan and William W. Chaffin borrowed from the bank at Salisbury, on a note made by Nathan, and endorsed by the other, the [267] sum of $2,000, to be invested, as they said, in a pork speculation. On the 25th of January 1823, William W. gave to the other, his covenant to pay one-half of the sum in regular bank instalments; and on that instrument this charge is founded. The court would feel more secure of making a right decision, if it appeared that the speculation were abandoned, or that it had been completed, and the pork sold or divided; upon which points, or any others relative to the matter, the defendant can be again interrogated or the parties offer proof.

The remaining items arise upon two notes, in which, from inspection, it is not clear whether they were intended to be payable to Nathan Chaffin, Junior, or Senior, as the word is abbreviated, and the letters imperfect. The one is for $110, dated March 10th 1822, and the other is for $200, dated June 14th 1821. The latter may be explained by proof, as to which of the persons sold the land in Ashe county that is mentioned in it. This note has obviously also been cut or mutilated at the bottom. The master thinks it was probably done in the office, in separating it from the deposition in which its execution was proved. But as it has to go before the master again, the plaintiffs will have the opportunity of interrogating the defendant upon every part of the case.

All the exceptions are thus disposed of, except the 7th and 11th, which object that the master has not found the values of the lands devised to John A. and George H. Chaffin, respectively, nor the value of the personal estate of the testator which came into the hands of John A. Chaffin: and also object, that

the plaintiffs in the second bill cannot charge John A. and George H. in respect of the real assets. These, as exceptions, cannot be sustained, because the reference did not include the subjects. Whatever benefit the exceptants may be entitled to, from the matter therein set forth, they will of course have, upon any motion that may be made for further directions.

With the exception of the points re-committed to the master, as herein stated, the report must therefore stand confirmed.

PER CURIAM. Order accordingly.

NOTE.—As it is no ground of exception to the master's report, that he has not acted upon matters not embraced in the reference, so his report will not be recommitted, in order to have an immaterial matter ascertained, although orinally ordered in the reference. *Shutt* v. *Carloss*, 1 Ired. Eq. Rep. 232.

Where a new partner came into a firm, and the business was continued at the same place under the same name, and one of the members of the new, who had also been a member of the old firm, afterwards gave a note in the name of the firm to a workman to secure a debt due him from the old firm, which was regularly entered on the books of the new firm, it was held to be binding on the new firm, unless the new member could prove that the note was given in bad faith and that the payee knew it. *Abpt* v. *Miller*, 5 Jones' Rep. 32.

STEPHEN LYON *v.* CHARLES L. CRISSMAN. [268]

The objection, that an agreement is void because not reduced to writing, cannot avail a party, unless he sets it up in the pleadings.

When the plaintiff avers one agreement, and the defendant sets up another, as to the terms upon which a sheriff's deed was made to the defendant, and *either* may consist with the fact; if the sheriff were not a party to the agreement between the plaintiff and defendant, the proof of it by parol will not violate the rule which forbids parol evidence to be received to contradict or explain a written instrument.

The plaintiff charged by his bill, filed against Charles L. Crissman, in his life-time, that he purchased a tract of land, at execution sale, for $101; and that he borrowed of Crissman $75, to enable him to make up the amount of the purchase money; and that, thereupon, and for the purpose of securing the repayment of the sum so advanced, the sheriff was directed to make, and did make, a conveyance of the title to Crissman. He further charged, that he had since tendered the amount

borrowed, principal and interest, but Crissman had refused to receive it and to convey the land. The latter, by his answer, admitted the original purchase by the plaintiff, and the making of the title to *him* by the plaintiff's direction; but denied the agreement upon which the plaintiff charged this to have been done. On the contrary, he averred that when the plaintiff applied to him, immediately after bidding off the land, for the loan of $75, to enable him to complete his purchase, the defendant refused to advance the money; and, thereupon, the plaintiff not only voluntarily transferred the bid to the defendant, but lent *him* $26 to pay for the land.

After replication to the answer, the original defendant died —his representatives were made parties—and the cause was heard upon the proofs.

J. T. Morehead, for the plaintiff.

D. F. Caldwell and *Boyden*, for the defendant.

Gaston, Judge.—The only matter in contestation is, what was the agreement upon which the plaintiff transferred to Crissman the benefit of his bid at the execution sale. The [269] latter has insisted that it was an act purely gratuitous, and that Lyon was to be in no way interested in the purchase. There are several circumstances rendering this representation highly improbable. The answer avers that the defendant had sold the land, so conveyed to him, for tobacco, and had tendered to the plaintiff his *rateable proportion* of this tobacco. What means this alleged tender, if Lyon had no interest in the land? Again, the price bid by Lyon was $101; he was able to pay, with his own means, but $26, and applied to Crissman for a loan of $75, to enable him to complete a highly desirable purchase; and, instead of this arrangement, Crissman takes the land to himself, at $101, pays $75 with his own money, and borrowed from Lyon the $26, being the exact and full amount of all *he* had been able to get together, to make his payment. And this is alleged to be done solely to disappoint the next highest bidder to Lyon. And for the money, so lent by Lyon, there is no security.

But, the proofs are full and positive, so much so, that the

only defence made at the hearing was, that no parol evidence ought to be received of the agreement. If the objection be, that the agreement is void, because not reduced to writing, and this objection could avail any thing, it should have been set up in the pleadings. But this has not been done. The plaintiff avers one agreement, and the defendant sets up another; and the parties have left it to proof which representation of the transaction is the true one. *Either* may consist with the fact of the sheriff's deed having been made to the defendant. The sheriff was no party to the agreement, and the proof of it does not violate the rule which forbids parol evidence to be received to contradict or explain a written instrument.

The conveyance of the legal estate to the original defendant is declared good, as a security for the money advanced by him to the plaintiff; the ordinary accounts as between mortgager and mortgagee are to be taken; and the plaintiff is to be let in to redeem, on payment of what may be found due.

PER CURIAM. Decree accordingly.

NOTE.—See *Parker* v. *Vick*, ante 195, and the note thereto.

ELIZABETH HOLLOMAN *v.* ABNER HOLLOMAN. [270]

The Supreme Court has only appellate jurisdiction of a suit for divorce when brought in the Court of Equity, as well as when brought in the Superior Court of Law, under the Revised Statute, "concerning Divorce and Alimony," 1 Rev. St. ch. 39.

This was a divorce cause, begun by bill filed in the Court of Equity for Wayne county, and answered by the husband. After replication and much evidence taken, the cause was set down for hearing, and then transferred to this Court to be heard.

J. H. Bryan, for the plaintiff.

No counsel appeared for the defendant in this Court.

RUFFIN, Chief Justice.—On the hearing, a doubt of our jurisdiction, in the present stage of the case, occurred to the Court; and on examining the revised statute, 1 Rev. St. ch. 39, we are

satisfied the doubt is well founded, and that the cause must be remanded for the purpose of decision, in the first instance, in the Court of Equity below.

By the act of 1814, the jurisdiction was vested exclusively in the Superior Courts of Law; and, in order to prevent divorces by collusion, it is provided that the material facts charged in the petition shall be submitted to a jury, upon whose verdict, and not otherwise, the Court shall decree; and, by the act of 1827, ch. 19, an appeal, after final judgment in the Superior Court, is given to this Court, "whose duty it shall be, *according to the facts ascertained in the Superior Court*, to make such a decree as shall be just." Then came the act of 1834, whereby a concurrent jurisdiction in the Courts of Equity is created. As this last act is silent as to the mode of proceeding in the Court of Equity, it might, perhaps, have been supposed that the Legislature intended the proceedings to be according to the established course of that Court. Against that construction, however, strong reasons existed in the provisions already quoted, of the two preceding acts, inasmuch as all the acts being *in pari materia*, ought to be interpreted together. The same important considerations, which require proof from the parties of the alleged causes of divorce, and that those
[271] proofs should be submitted to a jury, exist, whether the trial be on one side or the other of the Superior Court. At all events the act made no change as to the mode of bringing a cause into this Court; and, therefore, as the act of 1827 legislates on this point specifically, it cannot be inferred, from the general terms of the act, of which the object was chiefly the more convenient dealing with applications for alimony, that it intended to annul the special provisions respecting the jurisdiction of the Supreme Court.

But, whatever might have been the construction of those acts, standing in the statute book thus separated from each other, there can be no doubt of the sense in which those provisions are to be received, as they are found now, condensed into one chapter of our statute book. By the 1st section of ch. 39, the jurisdiction of divorce and alimony is possessed by the Superior Courts of Law and the Superior Courts of Equity; and by the first proviso of the 5th section, the language of the act

of 1814 is repeated, "that in all suits commenced under *this act*, the material facts shall be submitted to a jury." By positive enactment, therefore, the mode of trial in the Court of Equity is now to be by jury. That can be much more conveniently done on the Circuit than in this Court; which furnishes a further reason why we should not enlarge our jurisdiction without a plain mandate from the Legislature. But in the 13th section there is found the restriction of the act of 1827, re-enacted as to the appeals from a Court of Law, and extended to those from a Court of Equity. The words are, that "in *every* case of an application for a divorce, and a final judgment thereon by the Superior Court of Law or *Court of Equity*, it shall be lawful for the party against whom such judgment is rendered, to appeal therefrom to the Supreme Court; whose duty it shall be, *according to the facts ascertained in the Superior Court*, to make such decree thereon as shall be just." It seems plain, from these quotations, that the only question the parties were allowed to bring here is, what decree, *upon the case stated and found in the record*, ought the parties to have, regard being had to their personal rights and happiness, and to the cause of good morals in a well regulated [272] Commonwealth.

The Court having only an appellate jurisdiction, must remand the cause to the Court from which it came.

PER CURIAM. Cause remanded.

NOTE.—The acts of 1814 and 1827, as condensed in Rev. Stat., ch. 39, are contained in the Revised Code, ch. 39; and the 13th section of the act in the Revised Statutes is contained in the 16th section of the Code. See *Miles* v. *Miles*, 2 Jones' Eq. Rep. 21.

EPHRAIM DICKEN, Ex'r. of GODWIN COTTON, *v.* JOHN W. COTTON et Uxor et al.

A lapsed legacy of slaves will not pass under the residuary clause of a will giving "the residue or balance" of the testator's "money;" but will be a residuum of the testator's property, undisposed of by his will, and of course go to his next of kin.

The case of *Simms* v. *Garrott*, 1 Dev. & Bat. Eq. Cas. 395, approved.

A charge on a partial residue given in the will, operates for the benefit of the

other legatees; but none of the legacies are to abate, unless the undisposed property should prove insufficient for the payment of debts.

This bill was filed by the executor of Godwin Cotton, for advice as to the construction of his will, which contained, among others, the following clauses, to-wit: "I give and bequeath unto Gemison G. Cotton, son of Arthur L. Cotton, two hundred and fifty dollars. 2dly, I give and bequeath unto Edwin Whitehead, son of Joseph Whitehead, deceased, two hundred and fifty dollars. 3dly, I give and bequeath unto Mary Godwin Cotton, daughter of Joseph Whitehead, deceased, two hundred and fifty dollars. 5thly, I give and bequeath unto Laura P. Cotton, wife of John W. Cotton, Eliza Thompson, wife of Noah Thompson, and Ephraim Dicken of Tarborough, all my negroes, (except negro man Eli,) to be equally divided between Laura P. Cotton, Eliza Thompson, and Ephraim Dicken, share and share alike. 6thly, I give and bequeath unto my negro man Eli, his freedom, and three hundred dollars in money, to be left in the hands of my executors, &c. 9thly, It is my will and desire, that after all my just debts are paid, and the aforesaid legacies are paid, that the residue, or balance of my money, be equally divided between Henry L. Irvin, Tho-
[273] mas B. Irvin, and Christopher L. Dicken, share and share alike."

The executor charged in his bill, that Gemison G. Cotton and Eliza Thompson had died before his testator, whereby, he was advised that their legacies had lapsed. He then stated that there was a deficiency of assets to pay the debts, except from the hire of the negroes, and that he was advised the persons entitled to the negroes were entitled to their hires, to be reimbursed from the residue of the estate; and that there was no fund in his hands to pay the pecuniary legacies mentioned, except the negroes given to Eliza Thompson, and which lapsed by her death before the death of his testator; but, as to that, and the negro Eli, the executor said that he was in doubt whether they passed under the residuary clause in the will; whether the legacies were to be paid—if paid at all—as to their whole amount, or should abate *pro rata;* or whether, as to the negroes given to Eliza Thompson, and the man Eli, the testator

died intestate, and the said negroes thereby went to the next of kin of the testator.

To the bill, answers were filed, and upon the hearing in the Supreme Court, whither the cause was transmitted, it was represented that the man Eli had refused the gift of freedom, on account of the requisition in the law that he should leave the State.

B. F. Moore and *Iredell*, for the next of kin.

Badger and *J. H. Bryan*, for the residuary legatees.

GASTON, Judge.—It is represented by the parties in this suit, that the negro man Eli refuses the gift of freedom, because of the condition to leave the State, which the law annexes to emancipation. The question, therefore, is not presented whether, since our act of 1830, (1 Rev. Stat. ch. 111, sec. 58,) a bequest of freedom to a slave is to be deemed null, or construed an injunction on the executor to procure his emancipation, according to the provisions of that act.

The legacy to Eliza Thompson, having lapsed by her death before the testator, the negroes bequeathed to her, as well as the negro Eli, fall into the residuum of the testator's estate; and the question is, whether that residuum is disposed of by his will. The defendant Irvin, and others, claim it, un- [274] der the 9th clause of the will. We are of opinion, however, that the terms made use of in that clause, "the residue or balance of my money," are not general enough to take in these negroes. *Simms* v. *Garrott*, 1 Dev. & Bat. Eq. Cas. 395. They are therefore undisposed of by the will, and go to the next of kin.

The charge on the partial residue, bequeathed in the 9th clause, operates for the benefit of the other legatees. But none of the legacies are to abate unless the undisposed property should prove insufficient for the payment of debts.

PER CURIAM. Decree accordingly.

NOTE.—See the late case of *Lea* v. *Brown*, 3 Jones' Eq. Rep. 140, where the distinction between a general and a special residuary clause in a will is discussed, and where most of the cases in our courts on that subject are referred to and explained.

JOHN M. CLOUD et al. *v.* JOSEPH MARTIN, Adm'r. of JOHN MARTIN.

Where a testator directed that his infant grand-son and grand-daughters, who were orphans with but little property, should "be raised and taken care of" by their uncle; that the grand-son should "have, at the age of twenty-one, a small negro boy, and a horse and saddle worth $75; and be educated so as to understand and know the English, Latin and Greek languages; and after this far learned, to be got to the study of the law, if capacity will allow of it;" and that the girls should "be educated so as to read and write;" *it was held*, that the direction in the will created a charge upon the testator's estate for the support of the grand-son during his minority, and for his education at the common grammar schools or academies of the country, but not for sending him to College, or supporting him during the time he might be studying the law, or any other profession; and that the testator did not mean to maintain his grand-daughters absolutely until full age or marriage, but intended to provide for the expenses of their tuition, board and clothing up to the age at which young women in the same station are deemed capable of providing for themselves, or of rendering such services in the paternal household as will compensate for their maintenance.

If an executor have a balance of the residuary estate in his hands, and waste it and become insolvent, the loss must fall on those entitled to the residue, and not on those for whose benefit a particular sum was directed to be raised.

The plaintiffs were a grand-son and two grand-daughters of John Martin, who made his will and died in 1822. Their
[275] father died intestate, leaving very little property, in 1814, when they were quite young. The grand-father, by his will, desired "that my three grand-children, John Martin Cloud, Mary Ann Cloud and Jeroam Elizabeth Cloud, be raised and taken care of at the direction and care of my son, James Martin; and the two girls be educated so as to read and write, and Martin, as hereafter mentioned in this will. I also will that John M. Cloud have, at the age of twenty-one years, which I now will and bequeath to him, a small negro boy by the name of Saunders; also one horse and saddle, worth $75; and be educated so as to understand and know the English, Latin and Greek languages; and after this far learned, to be got to the study of the law, if capacity will allow of it." The testator did not nominate an executor; and his son James, who is mentioned in the recited clause of the will, and another son, Joseph, the present defendant, took out letters of administra-

tion with the will annexed; and said James was also appointed the guardian of the three plaintiffs respectively. James Martin chiefly acted in the administration, and died insolvent, in 1833; and there was no personal representative of him. For a time, the said James sent the plaintiffs to school; but he then resigned the guardianship, and their mother became the guardian of the plaintiffs, and received from the administrators some inconsiderable sums for the support and education of the plaintiffs. The mother then resigned, and another guardian was appointed for John M. Cloud; to whom it does not appear that any funds were paid, though he sent his ward to a grammar school, with the approbation of James Martin.

The bill was filed by the three grand-children against Joseph Martin, the surviving administrator, to have the value of the bequests in their favor ascertained, and also the sums that have been applied for their benefit; and after deducting the same, to have the residue, whatever it may be, raised out of the estate and paid to them.

The bill did not charge that there was any deficiency in the education of the female plaintiffs; and, indeed, their mother proved that they were instructed according to the directions in the will. But, the bill alleged that they were not sufficiently provided with clothing; and that neither for that [276] nor their schooling was payment made by the administrators, or either of them.

The bill charged, in respect to the other plaintiff, John M., that he was imperfectly educated, inasmuch as he was not sent to College at all, nor to good grammar schools, nor for a sufficient length of time; that being desirous of pursuing the liberal profession, designated by his grand-father, he went to school upon his own credit, and obtained a defective knowledge of Latin and Greek, and also studied law; that he owed therefor considerable sums of money, which ought to be reimbursed to him out of his grand-father's estate; and also a reasonable sum for board and clothing, during the periods of pursuing his studies.

The answer insisted that the plaintiffs were sufficiently educated; and if not, that the superintendence of their education was a personal trust confided by the testator to James Martin, for the violation of which the defendant ought not to be liable.

The answer also stated that James Martin came to an account with the persons entitled under his father's will, and had credit for sums laid out for the plaintiffs, and yet had a balance in his hands of $800, which was applicable to the uses of the plaintiffs, and had never been accounted for to the other persons entitled; and, thereupon, insisted that a proper fund was thus in the proper hands for the benefit of the plaintiffs; and that, if it had been lost by James Martin's insolvency, the estate could not be charged with it a second time.

Boyden and *Badger*, for the plaintiffs.

J. T. Morehead, for the defendant.

Ruffin, Chief Justice, having stated the case as above, proceeded as follows: We had occasion, in an action at law, some years ago, to intimate some of the opinions we had upon this will. *Cloud* v. *Martin*, 1 Dev. and Bat. 397. Upon a reperusal of it, we all think as we then did, as to the extent of the benefit intended for the grand-son. The education to be provided from the estate, was that which would be received during the period the children were to be "raised and [277] taken care of" by their uncle; which, it seems to us, must be while they were infants and going to school. The testator did not mean that James Martin should control the grand-son in the choice of a profession; and, of course, not that his maintenance, while he was studying a profession, should be paid out of his estate. The testator could not have intended to make his bounty in this respect dependent upon his grand-son's being fit for, or choosing the profession of the law only. It would not be reasonable to suppose so; and it seems quite clear that there would be no pretence for claiming his support out of the estate, while acquiring any other profession or art. It follows, that it is to be the same, should he study law. The reason why the allowance was not continued by the testator was, that at full age the grand-son would have the entire control of the capital of his own small property, and its accumulations during his minority, as well as the specific legacies given in the will; which, together, would be an adequate provision for this purpose.

From the terms employed by the testator, we conclude also, that it was not his purpose to have this young man sent to College at the expense of his estate. If it had been, there would not have been the restriction to the three languages, which constitute the rudimental education of grammar schools or the academies of the country. At institutions of that character, it appears, by the evidence, the testator had placed some of his own sons, and that one of them was then sent to college. Though himself illiterate, the testator was aware, from experience, of the difference between those seminaries of learning. We have no doubt, therefore, that he designed to have this youth bred at such grammar schools in his vicinity as his own sons had been brought up in, under his own directions; and that his clothing should be of that plain and cheap kind which is made in country families, such as he provided for his own sons, while at those schools. The expenses of such clothing and his board, at school, during a reasonable period for the acquisition of the specified degree of knowledge, we think, is charged on the testator's estate. What education this person acquired, how long he was at school, whether the schools were proper, how much longer or to what other schools, if any, he ought [278] to have been sent, are all questions on which the case must go before the master, if either of the parties wish an inquiry upon them. So it must be referred to the master, to ascertain what were the expenses of this plaintiff's board, clothing and tuition, while at school, or what would be a reasonable sum therefor, according to the particulars already mentioned; and what proportion of such expense was defrayed by James Martin, or out of the testator's effects; and what proportion remains still unpaid.

The Court is also of opinion, that the testator did not mean to maintain his grand-daughters absolutely until full age or marriage: nor to take them from under their maternal roof and government. He meant that the expenses of their tuition should be borne by his property, and such plain apparel found during the time as was usual for children in the country, and also their board, if it became necessary that they should be sent from home to go to school, or to a proper school. Of course, this allowance cannot be extended beyond the age at which

young women in the same station of life with these are deemed capable of providing for themselves, or of rendering such services in the paternal household as will compensate for their maintenance. What shall be a proper allowance in this case, also, is a question which must go to the master; to whom the parties can give evidence directed to the point; and, likewise, what sum has been paid, and ought yet to be paid, on that account.

At present, it is not necessary the Court should say any thing on that part of the defence set up, which is founded on the supposition that an ample fund was raised and retained by James Martin; and, therefore, that the estate ought not to be burdened again. What may be the law, if the fact should so turn out, it may be material hereafter to inquire. But, it does not appear, as yet, that any fund was set apart for this purpose; but only that James Martin, as administrator, had a balance of the residuary estate in his hands, which, it is said, he wasted. Now, admitting it to have been so, that loss ought not to fall on these persons more than on the residuary legatees; for it was not set apart or dedicated to this purpose in particular, or in any
[279] manner secured therefor. The loss must, therefore, fall on those entitled to the residue.

As the defendant does not admit assets of the testator in his hands to answer this demand, and denies his liability for the *devastavit* of James Martin, of course an account must be taken of the estate of the testator that was, at his death, liable under the will to this charge, and of its administration, so as to shew whether the defendant has, or ought to have, of the estate of his testator, any fund to answer the recovery of the plaintiffs.

PER CURIAM. Order accordingly.

NOTE.—See *Cloud* v. *Martin*, 1 Dev. & Bat. Rep. 397, and *Lindsay* v. *Hogg*, 6 Ired. Eq. Rep. 3.

WILLIAM P. WITHERSPOON et al. *v.* WILLIAM B. DULA et al.

When the depositions of the witnesses in an equity suit, transmitted to the Supreme Court for hearing, are in such direct conflict with each other that it is evident perjury has been committed, but the court cannot tell on which side

the guilt lies, it will direct feigned issues to be made up and tried in the Superior Court, where the witnesses may be personally examined in open court, instead of empannelling a jury before it, the Supreme Court, under the special authority conferred upon it for that purpose, where such personal examination cannot be had.

PER CURIAM.—The Court is wholly unable to satisfy itself, upon the proofs which have been taken in this cause, as to the truth of the matters of fact therein put in issue. Witnesses are in direct conflict with each other, so that there is certainly perjury on one side or the other, and the Court cannot tell on which side this guilt lies. To satisfy its conscience, it is obliged to call in the aid of a jury; but before a jury empannelled in this Court, under the special authority which the law has conferred for summoning such a jury, the witnesses cannot be personally examined. Such a jury, therefore, would have no further means of testing the credit of the witnesses, than is possessed by the Court. Under these circumstances, the Court deems it proper to direct feigned issues to be [280] made up and tried in the Superior Court of law for the county of Wilkes, to ascertain, 1st, whether a certain bond for the sum of $395, or thereabouts, executed on or about the 25th of September 1829, by the defendants William B. Dula and David E. Horton, payable twelve months after date, to William Dula, Senior, and John Witherspoon, administrators of Thomas Dula, deceased, was destroyed by the said William Dula, Sen., in his life-time; 2ndly, whether the said bond was executed by the defendants upon an engagement of the said William Dula, Sen., that he would settle the same in account with his intestate's estate, and the said defendant should not be required to pay the same; and 3rdly, did the said William Dula, Sen., in his life-time, account for the said bond, in settlement with his co-administrator, as being paid off by him. The decretal order will particularly specify the manner of trial of said issues.

NOTE.—When the Supreme Court sends down an issue to be tried in the court below, and exceptions are taken to such trial, it is the proper practice for the Judge below to present the question raised to this court, in order that the party objecting may have an opportunity of moving that the issue may be again sent. *Reed* v. *Barnhart*, 1 Jones' Eq. Rep. 142; see also, *Fisher* v. *Carroll*, 1 Jones' Rep. 27, where the distinction between sending an issue to be tried at law, and directing an action to be brought in a court of law, is pointed out.

SETH SPEIGHT *v.* JESSE SPEIGHT et al.

If an answer be directly responsive to the material facts charged in the bill, and be clear, precise and positive in its denial of them, and be not disproved or discredited in this part by what is found in any other part of it, the testimony of a single witness, where there is no circumstance to corroborate it, will not be sufficient to entitle the plaintiff to a decree; especially if the testimony of such witness be equivocal or evasive.

Whether an award fairly made by an arbitrator can be annulled, because a fact which existed was not communicated by one of the parties to the arbitrator or to the opposite party, when the person in whose favor the award is, had not undertaken to state the whole case, but the award was made upon a case agreed by counsel. Qu.

Thomas Speight became indebted by note to one Harper, in the sum of $400, and Jesse Speight and Lemon Speight also executed the note as the sureties of Thomas. In 1829, Harper brought an action at law on the note, and obtained judgment; and, thereupon, Thomas Speight filed his bill in the Court of Equity, to be relieved against the note and judgment, upon certain equitable grounds therein stated, and obtained the usual preliminary injunction. For the prosecution of
[281] that suit, the present plaintiff, Seth Speight, was the surety of Thomas Speight. While that cause was pending, Thomas Speight's property was all sold under other executions, and he became insolvent. The injunction was dissolved, and the bill dismissed, and a decree taken against Thomas Speight and the present plaintiff for the debt. A question, in that state of facts, arose between Seth Speight on the one hand, and Jesse Speight and Lemon Speight on the other, which of them was liable to pay the debt to Harper, or in what proportions it was to be paid by them respectively; and those parties agreed to refer that question to the arbitrament of a gentleman of the bar. Accordingly, a case was stated by the counsel of those parties respectively, on which an award was made against Seth Speight. The case, thus drawn up, was lost, and the particular contents did not appear. The award was made in May 1833, and was in these words:

"I have considered the statement submitted to me by Jesse

Speight and Lemon Speight of the one part, and Seth Speight of the other, examined all the papers accompanying it, and reflected on the principles of equity on which the controversy ought to be decided. It is not alleged in the statement that the bill of injunction, filed by Thomas Speight, was at the request or with the concurrence of Jesse Speight or Lemon Speight; nor that Seth Speight became bound as security for Thomas, at the instance or request of Jesse or Lemon. As these facts are in the highest degree material, I must presume that they do not exist, or that they would have been stated. My opinion, therefore, is predicated upon the assumption that they do not exist.

"I consider the rule in equity to be well established, that if any person enters into an arrangement with the creditor, in order to prevent or postpone the collection of the debt from the principal debtor, by which arrangement he renders himself liable to the creditor for such debt, the original sureties for the debtor have a right, on discharging the debt, to be substituted in the place of the creditor, and to resort to the security thus given to the creditor for their reimbursement. Believing this to be the established rule, I am obliged to decide, that, in equity, Seth Speight is, as between him and Jesse and Lemon Speight, bound for the payment of the entire debt in [282] question."

Seth Speight filed this bill against Thomas Speight, Jesse Speight and Lemon Speight's administrator, in September 1834; and, amongst other things, alleged therein that since the award was made he had been informed by Thomas Speight, that Jesse Speight, before the said Thomas applied for the injunction against said Harper, not only consented, but strenuously urged and advised the said Thomas to apply for and obtain the same; which statement of said Thomas the plaintiff charged to be true, and that a knowledge of the same was withheld from the plaintiff, by said Jesse, and also from the arbitrator, to whom, in good faith, it ought to have been communicated. The bill thereupon insisted, that as the material facts had been suppressed and withheld from the plaintiff's knowledge, the defendant Jesse could not, in equity, derive any benefit from the award. The bill prayed that Jesse Speight might, therefore,

indemnify the plaintiff and refund to him the whole or such part of the said debt as in equity he ought.

The answer of Jesse Speight admitted most of the facts set forth in the bill, and, among them, that Thomas Speight had become insolvent. But it denied that he was insolvent when the judgment at law was obtained, and affirmed that the debt could then have been levied of his estate, if the plaintiff had not interposed and become his surety for the injunction. The answer then insisted on the award, as a bar to the relief sought; and "denied positively that he, this defendant, ever advised or urged Thomas Speight to file the bill of injunction, or that he ever consented, directly or indirectly, that said Thomas should file said bill. On the contrary, the said Thomas determined on his course without consultation with this defendant; and he denied that he knew that Thomas Speight was about to procure an injunction, or that he ever assented to his procuring it."

To the answer, replication was taken; and the plaintiff, under an order, took the deposition of Thomas Speight, the principal debtor, and one of the defendants. He says, "I talked with Jesse and Lemon Speight on the subject, before I filed [283] the bill against Harper, and told them I should file one, if it could be done; and they said it was nothing amiss, if it could be done, to condemn the note to pay Harper's own debt." To the interrogatory of the plaintiff, "did they object to the bill being filed, or do you think they were consenting to its being done"? the witness replied, "they did not object, and I have no reason to think they were opposed to it." The plaintiff offered other evidence as to the period when Thomas Speight became insolvent; but Thomas Speight was the only witness to the point to which his testimony, just given, related. On the hearing, the counsel for the defendant Jesse Speight contended that there could not be a decree for the plaintiff upon the testimony of that single witness.

J. H. Bryan, for the plaintiff.

Badger, for the defendants.

Ruffin, Chief Justice, after stating the case as above, proceeded: In the opinion of the Court, the objection taken at the

bar is, in this case, well founded. It might, indeed, admit of much consideration, whether an award fairly made by an arbitrator could be annulled because a fact which existed was not communicated by one of the parties to the arbitrator or to the opposite party, when the person in whose favor the award is, had not undertaken to state the whole case, but the award was made upon a case agreed by counsel. Assuming, however, that silence upon such an occasion will deprive the party of the benefit of the award, as having been obtained by fraud on the arbitrator, the plaintiff must here fail, for want of proof of the fraud. It consists in concealing the facts that the defendant Jesse Speight had advised, concurred in and urged the filing of the bill by Thomas Speight. The fact of such urgency, concurrence, or advice, and, indeed, all knowledge that Thomas intended to file a bill, is directly and unequivocally denied; and much more, therefore, is the alleged fraudulent suppression denied. The testimony of the witness is by no means clear and pointed. It is quite vague and unsatisfactory. It amounts to hardly more than this, that the sureties, to whom he mentioned his purpose, would not oppose it: they said, [284] "it was nothing amiss—they did not object." But they did not assent, or say or do any thing that could be construed into concurrence, or more than mere acquiescence in their principal's pursuing his own course in defending himself. If a single witness could, therefore, overrule an answer, it could not be one making such a statement, in contradiction of the answer, as that before us. But the answer is not, like the deposition, equivocal; nor is it evasive; but it is clear, precise and positive in its denial, and directly responsive to the bill on this point. It is not disproved or discredited in this part, by what is found in any other part of it; and there is no circumstance in the case to corroborate the representation of the single witness, even in its present unsatisfactory shape. The settled rule in this Court is, that the answer must prevail in such a case.

The bill must, therefore, be dismissed with costs to the defendants, Jesse and the administrator of Lemon Speight.

PER CURIAM. Bill dismissed.

NOTE.—That a fact alleged in the bill, but positively denied in the answer, cannot be sustained upon the uncorroborated testimony of a single witness in

opposition to the answer, is well settled. *Lewis* v. *Owen*, 1 Ired. Eq. Rep. 290; *Averitt* v. *Foy*, 2 Ired. Eq. Rep. 224.

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[285] MUNGO T. PONTON, Ex'r. of JOEL H. McLEMORE, *v.* ELIZABETH McLEMORE et al.

Where a testator gave to his friend H. D. certain slaves "in trust for the support and maintenance of his daughter M. E. A., with an equal share of the proceeds of the sale of property which he should empower his executors to sell, with the exception of $500, to be taken out of the part of his daughter, of the money that might remain after paying his debts," and, after giving certain other slaves to his wife, and her children, and directing what property was to be sold, concluded as follows: "after the payment of my just debts, the surplus, if any, I wish to be equally divided between my wife and her children, and the part which I design for my daughter, with the exception of $500 aforesaid, to my friend H. D., as aforesaid in trust, for the support and maintenance of my daughter M. E. A. The property I hereby leave in trust, for the benefit of my daughter M. E. A., is to be applied at the discretion of the trustee, for the support and maintenance of M. E. A. and her children; and no part or parcel thereof to be subject to the debts of her husband." *It was held*, that the $500 was taken out of the daughter's share, and went to increase the balance or "surplus" that was to be divided between the testator's wife and children; and that the bequest in favor of the daughter was given to her sole and separate use *for life*, and after her death, in trust for her children.

Joel H. McLemore, by his last will and testament, devised and bequeathed as follows: "I give the following property to my friend, Henry Doggett, in trust, for the support and maintenance of my daughter, Mary E. Avent, viz: Austin, Senior, Cynthia, Emanuel, Daniel and Chaney, with an equal share of the proceeds of the sale of property, which I shall empower my executors to sell, with the exception of $500, to be taken out of the part of my daughter, of the money that may remain, after paying my just debts; the balance of my negroes, I wish to be equally divided among my wife and her child James Henry, and the one with which she is now pregnant. It is my wish and desire, that should I die shortly, that my executors sell the lots and houses I own in the town of Halifax, upon such credits as may seem to them best calculated to enhance the value of the property, together with all household and kitchen furniture; and, at the end of the year, I wish them to

sell my land, lying below the town of Halifax, and all my stock, crop and plantation utensils; the manner of selling I leave to my executors; and, after the payment of my [286] debts, the surplus, if any, I wish to be equally divided between my wife Elizabeth and her children; and the part which I design for my daughter, with the exception of $500 aforesaid, to my friend Henry Doggett, as aforesaid, in trust for the support and maintenance of my daughter Mary E. Avent. The property I hereby leave in trust, for the benefit of my daughter Mary E. Avent, is to be applied at the discretion of the trustee, for the support and maintenance of Mary E. Avent and her children, and no part or parcel thereof to be subject to the debts of her husband."

This bill was filed by the executor, stating the death of the husband of the testator's daughter Mary E. Avent, and the refusal of the trustee to act, and asking the advice of the court, as to the proper construction of the will, in the following particulars, viz: First, whether the sum of $500, directed to be reserved out of the said Mary E. Avent's share of the proceeds of the sale, was a legacy given to her absolutely, or was intended to be added to the share thereof of his widow and her children, or whether the testator had not died intestate thereof. Secondly, whether the said Mary E. Avent and her children had any other interest in the bequests to the trustee, Doggett, beyond support and maintenance during their lives and the life of the longest liver of them; and whether, if they had any interest beyond such support and maintenance, the said Mary E. Avent had the absolute interest, or she and her children were tenants in common, or whether she was tenant for life with the remainder to her children.

No counsel appeared in this Court for the plaintiff.

B. F. Moore, for Mrs. McLemore and her children.

Badger, for Mrs. Avent and her children.

Gaston, Judge.—One of the questions presented in this case is free from difficulty. It is clear that the sum of $500, in the testator's will, is mentioned by way of diminution of, or deduction from, the share of the residue bequeathed in trust for Mrs. Avent and her children; and, therefore, the balance, or

"surplus," to be divided between the testator's wife and her children, is increased by that amount.

[287] But the other question is by no means so easily answered. Taking into consideration, however, the pointed declaration of the testator, that "of the part designed for his daughter" he desires that "no part or parcel be subject to the debts of her husband;" that the bequest thereof is made to a trustee; that the trusts are to be collected from intimations as to the object of his bounty in different parts of his will; that in the first part, his daughter, Mary E. Avent, is solely named as that object; and, in the latter part, his said daughter and her children are all named as such objects, we are of opinion that the testator's purpose will be most effectually promoted by holding that the bequest was made in trust for his daughter, Mary, to her sole and exclusive use *for life*, and after her death, then in trust for her children. This interpretation, we think, is the more strongly called for, because, if we construe the immediate beneficial bequest to be made to Mary E. Avent and her children, none of the children could take under it, but those in being at the death of the testator. This, we are satisfied, could not have been his intention.

Under this construction, it will be necessary to have a trustee appointed in the place of Mr. Doggett, who declines to act.

PER CURIAM. Decree accordingly.

NOTE.—That in a bequest like the present, for the support and maintenance of a married woman and her children, the mother may, upon a proper construction of the will, take a life-estate only, with a remainder to her children as a class, see *Chesnut* v. *Mears*, 3 Jones' Eq. Rep. 416, and *Coakley* v. *Daniel*, 4 Jones' Eq. Rep. 89.

RICHARDSON NICHOLS et al. *v.* JOHN DUNN et al.

When an executor returns an account of sales in which he sets forth, besides the property the amount of sales whereof is stated, several lots of corn, cotton, &c., as being sold at the same time, with the prices *per* bushel or pound stated, but without giving the quantity of any one of them, or carrying out their amount in money, a commissioner, in taking an account of the estate, cannot reject these articles; but should call upon the executor, upon whom the burthen of proof is thrown in such case, for explanation in regard to them;

and, if none be afforded, should charge him with an amount making the assets at least equal to the disbursements.

On taking the account of the administration of the personal assets of William Keeling, deceased, by his [288] executor, the defendant Dunn, as directed by the decretal order of this Court, the Commissioner reported that the said executor received assets but to the amount of $180 04, while he paid debts of his testator, and made other disbursements on account of the estate of his testator, to the sum of $308 07, leaving a balance due to the said executor, and for which he was, in equity, a creditor, as against the real estate of the testator, in the sum of $128 03. To this report the defendants, the devisees of said real estate, excepted, and all their exceptions substantially presented the same objection. It appeared, from the evidence accompanying, and referred to in the report, that the commissioner fixed the amount of assets at the said sum of $180 04, from that amount being charged by the executor against himself, in an account of sales returned by him to the County Court. But the same account sets forth, besides the property the amount of the sales whereof was stated as aforesaid, several "lots of corn, wheat, cotton and wool," as being sold at the same time; stated the prices per bushel or pound at which these articles were severally sold; but gave not the quantity of any of them, nor carried out their amount in money. Upon this evidence, unexplained, the commissioner, being unable to ascertain the value of these omitted articles, left them out of his account of the amount of assets; and to this the said defendants excepted.

Badger, for the plaintiff.

W. A. Graham and *J. W. Norwood*, for the defendants.

Gaston, Judge, having stated the case as above, proceeded as follows: The Court is of opinion, that the exceptions are to be allowed, and the report set aside. This evidence threw the burthen of explanation on the executor, and those who claim through him, the alleged creditor of the real estate. If no explanation were given, the commissioner ought to have inferred that the assets were at least equal to his disbursements. As

the mistake of the commissioner may have prevented explanations which otherwise might and would have been rendered, the Court, while it sets aside the report, re-commits the [289] cause for making the inquiries heretofore ordered.

PER CURIAM. Order accordingly.

WILLIAM M. TUCKER et al. *v.* LEWIS WHITE et al.

A judgment creditor can only redeem upon the footing of shewing a good subsisting mortgage, which the mortgagor could go into a Court of Equity and redeem. The right of the creditor is founded originally on the idea of tacking, so that the mortgagor cannot redeem from him without paying both the mortgage money and the judgment debt. If, therefore, the mortgagor be excluded from the redemption, it cannot be open to his creditors; at all events, only under very special circumstances, if at all.

A mortgagor, and consequently his judgment creditor, cannot, since the act of 1826, 1 Rev. Stat. ch. 65, sec. 14, redeem a mortgage, after the lapse of the periods therein mentioned, from the time when the right of redemption accrued, that is, in the case where no day of forfeiture was fixed, from the time when the mortgage was created.

Whether one can file a bill in the character of a judgment creditor of a person stated to be a mortgagor, for the purpose of being let in to redeem, without giving to, or admitting in, the mortgagee a good title. *Quære?* It would seem to be inconsistent with the scope and object of such a bill, to impeach the title of the person from whom the redemption is sought.

The bill was filed on the 18th day of September 1835, and stated, that the defendant Lewis White became indebted to the plaintiff, for the price of a tract of land, in the sum of $1200; for which he gave two bonds, dated the 20th March 1819, for $600 each, payable, the one on 1st December 1819, and the other on 1st December 1820: that on the bond first due, the plaintiff obtained judgment, at law, on the 12th of June 1820, for principal, interest and costs: that five days preceding, viz: on the 7th of June 1820, Lewis White, upon the pretence of owing to one Duke Gwin the sum of $1781, conveyed to one Absalom Bostick, as trustee, eight slaves, being all White had, to secure the same, with authority to sell the slaves at any time after the 1st of December 1820, upon ten days' notice: that, in fact, White owed to Duke Gwin nothing, or, if any thing, a much smaller sum than that mentioned in the deed: that the

deed was acknowledged by the parties, at the court in which the plaintiff got judgment, and was registered; [290] but that Duke Gwin afterwards endorsed on it a credit for $1280 80, as of the 7th of June 1820, the date of the deed: that the deed of trust was contrived by the parties thereto, to defeat and defraud the creditors of White, and particularly the plaintiff; and that this also was known to Thornton P. Gwin, who was the father of said Duke: that after the plaintiff got his judgment, White sought to be relieved from the contract, in the Court of Equity, and to that end obtained an injunction; and that Duke Scales was White's surety therefor; that the injunction was dissolved, and the plaintiff obtained satisfaction, by selling, on the 12th of December 1820, on his execution from the Court of Equity, four of the slaves mentioned in the deed of trust, of the price of which a surplus of $102 remained in the hands of the sheriff. The bill further stated, that on the 11th of December 1820, Abraham Bostick, the trustee, set up to sale the remaining four slaves, in one lot, under the deed, and they were purchased by Thornton P. Gwin, before-mentioned, at the sum claimed by Duke Gwin as being then due to him, which a little exceeded $500: that this sale was in further execution of the meditated fraud on White's creditors, and intended to conceal it more effectually: that the said Thornton P. really paid nothing, but purchased upon a secret trust for White: as one proof whereof, it was stated that the slaves were sold for about half their value, which was the object of selling all together, instead of each separately, as desired by persons who were present and wished to bid.

The bill further stated, that, if the purchase of Gwin was not wholly in trust for White, it was upon an agreement between Gwin and White, that the latter might redeem the slaves by paying the sum advanced by the former, and interest thereon; and that, in truth, the purchase and the conveyance were but a security for the sum actually advanced by Gwin; and as proof thereof, the bill stated that Gwin declared to several persons, while the sale was going on, that he proposed to purchase for White, and give him the privilege of redeeming, and, for that reason, requested those persons not to bid against him; and also, that by White's direction, Gwin received on the

[291] next day, from the sheriff, the surplus of $102, arising from the sale of the other slaves under execution, to be applied towards the debt, for which the slaves purchased by Gwin were liable: the bill further stated that Gwin took the slaves into his possession, upon his purchase; but charged that it was only for the purpose of more completely deluding White's creditors.

The bill further stated, that the plaintiff obtained judgment on his second bond, but was unable to raise more than a small part of the debt, as he did not then know or suspect any unfairness or fraud in any of the transactions mentioned, nor that White had any right of redemption of, or interest in, the negroes; nor did any information upon those points reach him until May 1835. The bill, in relation to that part of the case, stated, that in 1827, White, having been arrested by some creditor, took the oath of insolvency, and that the plaintiff believed him to be really insolvent, but at the period before mentioned, the plaintiff was informed of the preceding circumstances by a nephew of White, and that he afterwards applied to Gwin to let him in to redeem the slaves, which the latter refused, and at the same time he threatened, that unless he quietly went out of the State, he would be prosecuted for perjury in taking the insolvent's oath; and thereby induced White to remove, in 1832, to Tennessee: that upon receiving such information, and having his suspicions otherwise excited, the plaintiff sued out process on his judgment, which was then dormant, and revived it for the sum of $595 88, and sued out a writ of *fieri facias* thereon, and delivered it to the sheriff, who was unable to levy it, or find any other property of Lewis White, except the four slaves and their increase, purchased by Gwin as aforesaid.

The bill was filed against Lewis White, and the executors and legatees of Thornton P. Gwin, who died before the suit was brought; and prayed that the deed of trust made by White and the bill of sale to Gwin might be declared fraudulent and void as against the plaintiff; or if not, that it might be declared that said White had and hath a right to redeem the slaves, and that he might be decreed to do so, or the plaintiff let in to do so in his stead; or, that the slaves might be sold, and the

sum due to said Gwin paid thereout, and the plaintiff's [292] debt be satisfied out of the surplus; and to those ends, that all proper accounts be taken.

The defendant Lewis White did not answer nor appear, and the bill was taken *pro confesso* against him.

The other defendants put in an answer, which stated, that they had no knowledge of the debts from White to Duke Gwin, nor of the execution of the deed of trust, nor of their testator's purchase; but that they had always understood, and did believe, that all those transactions were fair and honest, and were not intended to deceive or defraud any creditor of White: they believed that White did owe to Duke Gwin the money for which the four slaves were purchased by their testator; and, if not, that their testator was ignorant thereof, and paid the sum of $531—the amount of his bid—to the trustee or to the creditor himself, in good faith.

They further stated, that they were ignorant of any agreement for redemption, between White and their testator, and never heard their testator admit that any such existed, nor did they ever hear White himself claim such right of redemption, nor had any reason to believe that it was understood between said parties, that White could redeem. On the contrary, the answer averred that the defendant's testator took from the trustee an absolute conveyance, and always had possession of the slaves, claiming according to the terms of his deed: and it insisted that the said Thornton P. Gwin, and these defendants under him, had had possession under his purchase, from the time it was made in December 1820, to the filing of this bill in September 1835, claiming the said slaves adversely and absolutely, and without, in any manner, acknowledging any right in the said White, or the said White's in any manner setting up such right or claim; and thereupon relied on the lapse of time, and the statutes of limitations as if pleaded.

To these answers, the plaintiffs put in replications; and the parties having completed their proofs, brought the cause to this court to be heard.

Badger, for the plaintiffs.

Boyden, for the defendants.

RUFFIN, Chief Justice, having stated the case as above,
[293] proceeded as follows: Without stating the evidence particularly, it is sufficient to declare that the Court is satisfied, from it, that the statements of the bill of the fraudulent intents of the deed of trust from White to Bostick, and of the want of a consideration in that transaction, or in the subsequent sale from Bostick to Gwin, are not supported, but unfounded. The plaintiff has himself examined Bostick, and he declares his belief throughout the transactions and up to the time of giving his deposition, that the deed was a security for sums really due to Duke Gwin, or responsibilities incurred by him; and he says further, that he made the sale fairly, and that Thornton P. Gwin paid the sum he bid, namely, $531. In all this, that witness is supported by Duke Gwin, who has been examined by the defendants; and no witness testifies any thing to the contrary. The only circumstance of a contrary tendency is that of the credit on the deed of trust for $1280 80, of even date with the deed. Neither party asked an explanation of this entry from either witness; and by itself it is not sufficient to overthrow the direct asseverations of those two witnesses as to the good faith of that instrument. If the entry was made at the time it bears date, it could not have been deceptive, because it is the same with the date of the instrument; and, when it was acknowledged and registered, would shew that too large a sum had been inserted, by mistake in drawing the deed, or that the debt had been reduced before the deed was executed. From the amount of the credit, however, it is probable the entry was made afterwards, and with the view of regulating the computation of interest, was dated back. It appears in the bill, that Duke Gwin was the surety for White for an injunction against the judgment on a bond for this plaintiff for $600, due 1st December 1819; and probably the penalty of the injunction bond would be about $1280. Now, the bill states that the sum due on that judgment was raised by the sale of part of the negroes by the sheriff; and consequently it ought not to be raised again out of the other negroes, if this deed was really intended as an indem-
nity to Duke Gwin for that responsibility. He may,
[294] therefore, have entered the credit just before the sale by the trustee, as a discharge of the trustee from the duty

of raising so much from the remaining negroes, or of suing the sheriff. We can, indeed, only conjecture, at this day, how the truth was. But, at all events, a circumstance from which inferences may be deduced so consistent with innocence, ought not to serve as proof of a fraud. In our opinion, therefore, it must be declared, that the deed to Bostick and the sale by him were fair and good, as against the plaintiff.

It may be a question, whether one can file a bill in the character of a judgment creditor of a person stated to be a mortgagor, for the purpose of being let in to redeem, without giving to, or admitting in, the mortgagee a good title. It would seem to be inconsistent with the scope and object of such a bill, to impeach the title of the person from whom the redemption is sought; and perhaps for that reason, we should proceed no further in this case. But we think it best to pass by this point, since it is always more satisfactory to dispose of a cause upon its merits, or upon some point that would govern the decision if the litigation should be renewed. In our opinion, there is such a point in this case, which must always be fatal to the claim of the plaintiff, in whatever form it might be presented. Our allusion is to the effect of the lapse of time under the provisions of the act of 1826, ch. 28, 1 Rev. St. ch. 65, sec. 14, as a bar to the plaintiff, although it should be admitted there was an agreement for redemption between White and Gwin.

Upon the existence of such an agreement, as a question of fact, the Court entertains, upon the evidence, a confident belief in the affirmative. It cannot be positively denied, any more than admitted, by the defendants, as they were not parties to it. They leave the plaintiff to his proof; and the plaintiff does prove, by two witnesses, that T. P. Gwin expressly informed them that he wished to purchase for the benefit of White, who was to have the power of redeeming; and that he requested them, therefore, not to bid against him, and they accordingly desisted. Besides this direct evidence, there is the circumstance—very extraordinary, upon any other supposition—that $102 of White's money was received from the sheriff, and applied in part of the purchase-money Gwin ought to have paid.
An agreement for redemption also explains why White [295] should have agreed to setting up the negroes in a lump,

while persons desired them to be sold separately, and testify that, if they had been so sold, they would have brought nearly double the price they did.

But supposing the mortgage established, we think the time is fatal to the plaintiff. A judgment creditor can only redeem upon the footing of shewing a good subsisting mortgage, which the mortgagor could come into this Court and redeem. The right of the creditor is founded originally on the idea of tacking, so that the mortgagor cannot redeem from him without paying both the mortgage money and the judgment debt. If, therefore, the mortgagor be excluded from the redemption, it cannot be open to his creditor—at all events, only under very special circumstances, if at all. Such circumstances the bill professes to bring forward, by accounting for the delay; because the plaintiff thought the dealings between White and Gwin fair towards him, and had no suspicion to the contrary, until he received the information of White's interest, just before the beginning of the present controversy. But none of those allegations are admitted; nor has the plaintiff offered any evidence of their truth. This bill must, therefore, stand exclusively on the right of White himself. Now, as to him, the act of 1826 is a clear bar. This case falls under the last section, which provides for mortgages theretofore made, and enacts that "where the right of action has accrued within less than ten years, the presumption of payment, satisfaction, or abandonment, shall arise within thirteen years from the accrual of the right of action." Here there does not appear to have been any day of forfeiture fixed. The conveyance to Gwin was absolute upon its face; but there was a separate agreement between White and him, that he would convey to White upon the payment of the principal and interest. That, either could have insisted on, in this Court, immediately. Of course the time began from Gwin's purchase, on the 11th day of December 1820, and expired, according to the statute, on the 11th day of December 1833—nearly two years before the bill was filed. It is charged, however, that advantage was taken by Gwin of the criminality of White, in falsely taking the insolvent's
[296] oath, to terrify him from an attempt to redeem, and induce him to leave the State. But the plaintiff has

offered no testimony of any undue means on the part of Gwin, to induce White to take such an oath, nor to make it the occasion of extorting from him the renunciation of his rights. In the absence of such evidence, the admitted fact that White did take the oath of insolvency, without making an assignment of any interest in these slaves, strongly corroborates the legal presumption from the lapse of time. It is not to be assumed that the oath was either corrupt or false; and, if not, then it establishes that the witnesses were mistaken, in supposing that there was an agreement for redemption; or that Gwin subsequently satisfied White for the equity of redemption; or that, for some other sufficient motive, the latter had abandoned the right. But, as the case goes off on this point of time exclusively, and White may have been ruled more by poverty than influenced by his own will, or the merits of the other party, the bill will be dismissed without costs.

PER CURIAM. Bill dismissed.

NOTE.—The act of 1826 (1 Rev. Stat., ch. 65, sec. 14,) is contained in the Revised Code, ch. 65, sec. 19. By the 16th section of the same chapter, it is provided that mortgages of personal property must be redeemed within two years after forfeiture, or the right to do so shall be forever barred. See *Robinson* v. *Lewis*, Busb. Eq. Rep. 58; S. C., 2 Jones' Eq. Rep. 25.

BRYAN BURROUGHS *v.* DANIEL McNEILL. [297]

Where a plaintiff can have as effectual and complete a remedy in a Court of Law as that for which he invokes the aid of a Court of Equity—a remedy, direct, certain and adequate—the defendant may insist that this remedy shall be sought for in the ordinary tribunal. But this objection to the exercise of jurisdiction ought to be taken in due order and apt time; for, otherwise, if it be one which the party may waive, it will be deemed to have been waived, by failure to bring it forward to the notice of the Court *in limine*. Where the objection has not only not been taken in the pleadings, but the defendant has expressly submitted to the jurisdiction of the court, by praying of it to decide on the question of his liability, the objection must be regarded as one not of strict right, but addressed to the sound discretion of the Court.

Upon an agreement for an indemnity, the plaintiff has a right, without waiting for actual loss, to call on the defendant, in a Court of Equity, to indemnify him against impending injury, and, to that extent, enforce the specific execution of the agreement between them. But, before an actual loss sustained, the plaintiff can maintain no action at law upon the agreement.

Where a bond of indemnity is in the hands of the defendant, the plaintiff has a right to go into a Court of Equity for an exhibition of it, and for such relief there as, upon its exhibition, may be deemed just; and this without any previous demand of the instrument. The want of such demand may affect the costs, but does not *per se* oust the court of the right to decree its exhibition.

Where an agreement was made between an executor and D. M., that the latter should take possession of certain slaves belonging to the testator's estate, and keep them until the executor should be called upon for them and their hires by the person entitled thereto, and should indemnify the executor from all loss on account thereof; and the executor stipulated, that if so saved harmless, he would not, as executor or otherwise, have any further claim to said slaves, and moreover relinquished to D. M. all the right which he had, as executor, to them, *it was held*, that the commissions allowed to the executor in his account with the persons entitled, for collecting the hires of the slaves while in the possession of D. M., belonged to the latter; but that he was not entitled to the commissions allowed the executor for selling said slaves as commissioner under a decree of Court.

A defect of jurisdiction exists where courts of a *particular limited* jurisdiction undertake to act beyond the bounds of their delegated authority; or where a superior court of general jurisdiction passes upon subjects which, by the constitution or laws of the country, are reserved for the exclusive consideration of a different judicial or political tribunal.

No consent of parties can confer a jurisdiction withheld by law, and the instant that the court perceives that it is exercising, or is about to exercise, a forbidden or ungranted power, it ought to stay its action; and if it do not, such action is, in law, a nullity.

It is objectionable for the master, upon a reference made to him, to decline passing upon any claim brought before him, and submitting its validity to the court. He should decide, according to his best judgment, upon all the matters of mutual claim and discharge brought before him, and report his final conclusion thereon, affording to the parties an opportunity of having that judgment reviewed for error upon specific exceptions.

The plaintiff, Bryan Burroughs, filed his bill against the defendant, Daniel McNeil, in the Superior Court of Equity for the county of Moore, on the 1st of September 1835. The bill set forth in substance, that the plaintiff was the executor of one Joseph Duckworth, who, by his last will, had bequeathed [298] certain negroes to his wife for life, but had made no effectual disposition of the residuary interest therein after her death; that Mrs. Duckworth died in the year 1829; and the next of kin of the plaintiff's testator resided in different parts of the United States; that the plaintiff, having possession of the slaves, as the executor of Joseph Duckworth, it was proposed by the defendant that *he* should take possession thereof,

as plaintiff's agent, until distribution should be made amongst the next of kin; that this proposition was assented to by the plaintiff, upon the defendant binding himself to deliver the said negroes to plaintiff when they should be required for distribution, and account to the plaintiff for the hire thereof, as the plaintiff would be bound to account to the next of kin; that thereupon the defendant executed to the plaintiff an obligation to that effect, the precise nature whereof the plaintiff could not state, because he permitted the bond to go into defendant's possession, who had ever since retained, and yet refused to deliver it. The bill then proceeded to state, that the next of kin of Joseph Duckworth filed their petition against the plaintiff, in the County Court of Moore, and, in 1832, had a decree against the plaintiff for a considerable sum of money on account of the hire of the said negroes since the death of Mrs. Duckworth, and during the time when the said negroes were held or hired out by the defendant, under the said agreement; and that the defendant refused to account with the plaintiff, or to pay over the hire of the negroes held under said agreement. The bill prayed that the defendant might be compelled to exhibit to the Court the obligation so in his possession, and to account with and pay over to the plaintiff what was due for the hire and services of the negroes so held, and for general relief.

The defendant put in his answer on the 5th of March 1836. After admitting, in substance, the bequest of the negroes and the death of Mrs. Duckworth, and that the plaintiff was the executor of Joseph Duckworth, the defendant denied that the plaintiff, upon Mrs. Duckworth's death, took the *actual* possession of the negroes; but said that the plaintiff, claiming the possession of them as executor, and the defendant having them in possession, and being anxious to retain that possession, in order the better to assert a right which he set up to a [299] share therein, under a conveyance of some of the next of kin of Joseph Duckworth, the plaintiff and defendant came to the agreement in relation thereto, which was evidenced by two original instruments exhibited with the answer, one of them being the obligation called for in the bill; and the defendant denied that he ever refused to let the complainant have that obligation, or that the complainant called on him therefor. The

defendant admitted, that under this agreement he held possession of the negroes until the sale which was made of them in August 1832. He further stated that, in the account taken in the County Court, on the petition of the next of kin, the hire of the negroes for 1829, 1830, and 1831, was estimated at $175 per annum; said that the defendant claimed and had allowed to *him*, one year's hire; and said that he had also received $87, for the hire of the negroes from 1st January to August 1832, when the sale under the decree took place. The defendant claimed to be entitled to the share of Benjamin Duckworth, in the proceeds of the negroes, and to reasonable compensation for his services in managing the estate, and to have delivered over to him the *proceeds* of the sales made in the decree referred to, by virtue of his agreement with the plaintiff, which agreement he professed he had ever been willing to execute; and the question whether, according to its terms, spirit and meaning, he was, in any manner, accountable to the plaintiff, he submitted to the determination of the Court.

The exhibits accompanying the answer both bore date 27th of February 1830; the one was an obligation in the penal sum of $10,000, payable to the plaintiff, executed by the defendant and two others as his sureties, with a condition which, after reciting the will of Joseph Duckworth, the death of Hannah Duckworth, the duty of the plaintiff, as executor of said Joseph, to see the will executed, the taking possession of the slaves by the defendant, under a purchase from the next of kin of the testator, or some of them, and the willingness of the plaintiff to permit the defendant to retain that possession, and have the title to the slaves properly adjudicated, so that he should be saved harmless, as the executor of Joseph Duckworth,
[300] and not made liable for thus suffering the negroes to remain in the defendant's possession—proceeded to declare, that if the defendant should fully indemnify, and save harmless, the plaintiff in all suits, judgments, recoveries, and all costs and expenditures, whether of fees to attorneys, or clerks, or other necessary charges and expenses incurred in attending to any suit or suits, orders or decrees, which shall be made in any Court of Law or Equity, about and concerning the aforesaid slaves; and that the said McNeill, upon recovery,

should surrender said negroes, or account for their value and hire; and in all respects save harmless said Burroughs, and pay all charges and expenses which should arise in consequence of said Burroughs having suffered McNeill to retain possession of said slaves; then the obligation to be void, otherwise in force. The other was a deed under the seal of Burroughs, which, after referring to the foregoing obligation, declared it to be the intent of the parties thereto and to this instrument, that if McNeill should save Burroughs harmless, the latter should not be at liberty to take or recover possession of the said slaves; and the latter thereby agreed, if so saved harmless, he would not, as executor or otherwise, have any further claim to said negroes; and, moreover, thereby relinquished to McNeill all the right which he had, as executor, to said negroes.

Upon the coming in of the answer, an order was made, whereby "the cause was referred to the Clerk and Master, to take the account without prejudice to the hearing," and said account, having been accordingly taken, and the report thereof confirmed by the court, the cause was removed into this court for hearing.

Mendenhall and *Winston*, for the plaintiff.

Badger, *Worth* and *W. H. Haywood*, for the defendant.

Gaston, Judge, having stated the case as above, proceeded as follows: Upon the hearing, the right of the plaintiff to an indemnity from the defendant, to the extent of the decree made against the plaintiff for the hire of the negroes while held by the defendant under the agreement, has not been contested; but it was insisted that the plaintiff might have enforced this indemnity by an action at law upon the bond: that [301] the bond was in the hands of the defendant, by his permission, and might have been had at any time, upon his demand; and that this being a case where a plain and adequate remedy could have been had at law, it was not one proper for the cognizance of a Court of Equity: that where a defect of jurisdiction appears at the hearing, the court will no more make a decree than where a plain want of Equity appears: and that therefore the bill ought to be dismissed. The objection thus urged

is not, properly speaking, because of a *defect* of jurisdiction. A defect of jurisdiction exists where courts of *particular limited* jurisdiction undertake to act beyond the bounds of their delegated authority, (*Green* v. *Rutherforth*, 1 Ves. 471;) or where a Superior Court of general jurisdiction passes upon subjects which, by the constitution or laws of the country, are reserved for the exclusive consideration of a different judicial or political tribunal, as where the Court of Chancery in England undertakes to determine cases belonging solely to the cognizance of the King in council. *Penn* v. *L'd Baltimore*, 1 Ves. 446. In these, and in cases like these, there is a plain *defect* of jurisdiction. The exercise of power here would be usurpation, for no consent of parties can confer a jurisdiction withheld by law; and the instant that the court perceives that it is exercising, or is about to exercise, a forbidden or ungranted power, it ought to stay its action; and, if it do not, such action is, in law, a nullity. But the objection here urged is, that the court *ought not* to exercise jurisdiction over a subject upon which it can lawfully act, because the exertion of its extraordinary powers is not necessary for the purposes of justice. And certainly it is a general rule, that where a plaintiff can have as effectual and complete a remedy in a Court of Law, as that for which he invokes the aid of a Court of Equity—a remedy, direct, certain, and adequate—the defendant may insist that this remedy shall be sought for in the ordinary tribunal. But there is also a general rule, that this objection to the exercise of jurisdiction ought to be taken in due order, and apt time; for otherwise, if it be one which the party may waive, it will be deemed to
[302] have been waived by failure to bring it forward to the notice of the court, *in limine*. The objection not only has not been taken upon the pleadings in this cause, but the defendant has expressly submitted to the jurisdiction of the court, by praying of it to decide upon the question of his liability. After this submission on his part, the objection must be regarded as one not of strict right, but addressed to the sound discretion of the court. But the objection is, in our opinion, unfounded. The plaintiff has a right, without waiting for actual loss, to call on the defendant to indemnify him against impending injury, and, to that extent, enforce the specific exe-

cution of the agreement between them. He shews this injury to be *imminent*, for he alleges a decree against him, to pay the hires of the negroes to the next of kin of Joseph Duckworth; but it nowhere appears that the decree has been satisfied; and until it be, he has sustained no *loss*, and can maintain no action at law upon the bond. Moreover, the bond was in the possession of the defendant, and the plaintiff had a right to come into equity for an exhibition of it, and for such relief there, as, upon its exhibition, might be deemed just. True, the defendant avers, and this averment must be taken to be true, that the plaintiff, before filing his bill, did not make demand for its production; but he does not aver that it was ready to be produced, had it been demanded. The failure to make this demand will have its proper weight, when we come to consider of the costs of the suit, but it does not *per se* oust the court of the right to decree its exhibition. The motion to dismiss the bill is therefore overruled.

The report of the Master, to which no exception has been taken on either side, sets forth the amount wherewith the plaintiff was charged, in the suit of the next of kin of Joseph Duckworth, (in which suit the present plaintiff and defendant were both parties—defendants,) because of the hire of the negroes while in the hands of the defendant, deducting therefrom that portion which the defendant claimed before him, as the holder of the share of Benjamin Duckworth, and finds the balance, with the interest to the 1st of March 1838, to be $587 20. The report further states that the defendant denies this amount to be due, and insists that *he* ought to have a credit for $357 37½, and interest thereon, being the amount of [303] commissions allowed the plaintiff, as executor of Joseph Duckworth, in the said suit, because of the plaintiff having transferred to him all the plaintiff's interest as executor in that estate. The Master does not pass upon this claim, but submits its validity to the Court. This mode of reporting is objectionable. The Master should decide according to his best judgment upon all the matters of mutual claim and discharge brought before him, and report his final conclusion thereon, affording to the parties an opportunity of having that judgment reviewed for error upon specific exceptions. But the report, such as it

is, has been confirmed; neither party has prayed for a re-hearing of the order of confirmation, but both have argued before us the special matters so reserved by the Master for the consideration of the Court. We have, therefore, proceeded to ascertain the right in relation thereto.

Upon looking into the exhibits accompanying the report, it is manifest that the defendant is in a great error with respect to the amount of the commissions which, in the suit referred to, were allowed to the plaintiff. The decree of the Court in that suit was grounded mainly on an account taken by auditors, wherein the present plaintiff was debited with the hire of the negroes for the years 1829, 1830 and 1831; and credited therein, altogether, with the sum of $323 88½. This *credit* was made up of various items; one was for $175, being the hire of the negroes for 1829, and the interest thereon, which was *deducted*, as set forth in defendant's answer, because of Benjamin Duckworth's expenses in resisting certain suits affecting the title to the negroes. Other items are for debts of the testator paid by the plaintiff, and for debts due to him; and the whole amount of commissions allowed as a credit to the plaintiffs in that account, is but $30 50. The account appears to have been afterwards corrected, by allowing the defendant credit for errors in estimating the amount of debts paid by him, and charging him with the amount of the hire from January to August 1832, so as to make the *total* amount of credits on the account $367 37½: but no further sum was allowed as commissions, on the administration of his testator's estate, since the death of Mrs. Duckworth. We are of opinion that the
[304] defendant is entitled to the benefit of these commissions, because, in truth, they are charges against the estate, for the collection of the hires of the negroes while held by him and Benjamin Duckworth; whom, it is found by the report, the defendant represents. It would be contrary to the fair exposition of the agreement of the plaintiff and the defendant, that the plaintiff should derive *profit* from the defendant's agency. All that he is entitled to is, exemption from loss. This correction being made, the plaintiff is entitled to a decree for the balance. It appears that in the suit referred to, there was a decree that the negroes should be sold; and the plaintiff was

appointed by the Court a commissioner for that purpose. The Master's report does not fairly present the question; but it has been contended here, that the defendant ought to be allowed, in account with the plaintiff, a credit for these commissions. We think not. These were allowed to the plaintiff, not as executor, but as commissioner. But even if they had been allowed to him as executor, we construe the instrument exhibited, not as a transfer of the office of executor from the plaintiff to defendant—(a transfer which, by law, could not be made,)—but as an agreement that the defendant might hold the negroes and receive the hire thereof, *until* they were to be surrendered for distribution; and the sale took place after they were thus surrendered.

Very evidently, the claim advanced in the answer, and which has not been pressed on the hearing, that the defendant should have delivered over to *him* the proceeds of the sale, made under the decree for distribution, is unfounded.

The Master is to be allowed $10, for taking the account, and as it does not appear to us that any demand was made on the defendant for a settlement, or for a production of the obligation, before this bill was filed, we direct the costs of taking that account to be paid equally by the plaintiff and defendant; and as to the other costs, that each party shall pay his own respectively.

PER CURIAM. Decree accordingly.

NOTE.—It is well settled, that when the party has a full and ample remedy at law, the court of equity will not interfere. *Wells* v. *Goodbread*, 1 Ired. Eq. Rep. 9; *Champion* v. *Miller*, 2 Jones' Eq. Rep. 194.

A party having a right to an indemnity from another, as for instance a surety, from his principal or from one who stands in the place of his principal, may go into equity when the danger of loss is *imminent*, though at law he could have no redress until he had actually sustained damage. See *Bunting* v. *Ricks*, ante, 130; *Daniel* v. *Joyner*, 3 Ired. Eq. 512. On the subject of a *defect of jurisdiction* which cannot be waived, see *Branch* v. *Houston*, Busb. Rep. 85.

JOSEPH CHAMBERS *v.* JACOB HISE. [305]

An instrument, purporting to be an absolute bill of sale for slaves, with a condition annexed that if the vendee be not "satisfied" with the slaves, or the slaves with him, the vendor may "redeem them at any time" by paying the

amount of the purchase money, "or a negro girl to the satisfaction of the vendee," is not, upon its face, a mortgage of the slaves.

The plaintiff alleged in his bill, that in the year 1830, he obtained of the defendant, by the way of a loan, the sum of $300; and that, to secure the repayment of it, he mortgaged to the defendant a negro woman by the name of Jane, and her child. The bill was filed in 1836, for the purpose of redeeming the mortgage. The defendant, in his answer, denied that the transaction was, in fact, or intended by the parties to be, a loan of money, and a mortgage of the said slaves to secure the repayment of it. He said it was a sale by the plaintiff, and a purchase by him, of the slaves; and that the condition annexed to the bill of sale was inserted for his, the defendant's benefit, as the slaves were not present at the time, and not to make the instrument a security. The instrument was in the ordinary form of an absolute bill of sale, with the following condition annexed: "The condition of this bill of sale is such, that if the said Jacob Hise is not satisfied with the said negroes, or, if the said negroes are not satisfied with the said Hise, then the said Chambers has privilege and authority to redeem the said negroes, at any time that he shall pay, or cause to be paid, to the said Jacob Hise, the $300, or a negro girl to the satisfaction of the said Hise."

D. F. Caldwell, for the defendant.

Daniel, Judge, after stating the case as above, proceeded as follows: We have examined the instrument of writing, said by the plaintiff to be a mortgage, and upon its face we cannot hold it to be a mortgage. We have examined all the testimony offered, and that does not make it such. The deposition of the subscribing witness states, that the parties intended nothing more than what appears on the face of the instrument. According to him, therefore, there was neither fraud or mistake in the drawing of the deed. On a view of all the other [306] testimony, we find nothing to shew that the transaction was a loan of money by the defendant, and a pledge of the slaves by the plaintiff to secure the re-payment of the money. The condition appears to have been inserted only for

the benefit of the defendant, if he should not be satisfied with his purchase, on seeing the slaves; or if the negro woman should be unwilling to live with him. In either of the two events, the plaintiff agreed to re-purchase the slaves at the same price, in money, or to convey another negro girl in exchange. The defendant has never complained of his purchase; and we think the plaintiff has no right to complain, as the instrument is not, in our opinion, a mortgage.

The bill must be dismissed with costs.

PER CURIAM. Bill dismissed.

NOTE.—For the distinction between a mortgage and a conditional sale, see *Munnerlin* v. *Birmingham*, post 358; *King* v. *Kinsey*, 1 Ired. Eq. Rep. 187.

WILLIAM WOOTEN et al. *v.* ELIJAH POPE et al.

In a petition for the partition of land, or for the sale of it, for that purpose, under the act of 1812, (1 Rev. St. ch. 85, sec. 7,) if the statements as to the persons entitled to the land and their respective shares therein, be not sufficiently precise and distinct, the Court will direct a reference to the Clerk and Master, for the necessary inquiries as to the interests of the parties.

This was a petition by some of the tenants in common of a certain tract of land, against their co tenants, for a sale of the land for partition, under the act of 1812; (1 Rev. Stat. c. 85, sec. 7;) but the persons entitled to the land, and their respective shares therein, were not distinctly and precisely shown, either in the statements of the petition, or by the evidence produced to establish them. Nor did it plainly appear from the record, who had been served with process, or had appeared as defendants to the petition; but, nevertheless, the cause was set for hearing, and transferred to the Supreme Court to be heard.

B. F. Moore, for the petitioners. [307]

Badger and the *Attorney General*, for the defendants.

GASTON, Judge.—The statements in the petition as to the persons entitled to the premises, and of their respective shares therein, are wanting in distinctness and precision, and the evi-

dence to establish these statements is as vague. We think it proper, therefore, to adopt a practice which prevails in analagous cases in England, which is there found convenient; and which, in our country, where the subdivision of estates, under the law of descents, so greatly increases the difficulty of ascertaining the remote collateral heirs of a deceased person, is almost indispensable. The plaintiffs there, in a bill for partition, state upon the record, their titles and those of the defendants; and whenever there is a difficulty respecting them, the Court directs a reference to ascertain what are the respective interests of the parties; and if it appear that they, or some of them, are entitled to the whole, then a partition is decreed according to the rights of those entitled, dismissing the bill as against those having no right. *Agar* v. *Fairfax;* and *the same* v. *Holdsworth*, 17 Ves. 552. In this case, indeed, the application is for a sale under our act of 1812 (1 Rev. Stat. ch. 85, sec. 7,) but that sale is but a substitute for partition; and, before it is decreed, there ought to be an ascertainment of the interests of the parties. The Clerk of this Court is therefore directed to make these inquiries. At the same time, he is directed to inquire and report whether a sale of the premises be necessary; and, as the transcript from the Court below does not plainly shew who have been served with process, or appeared as defendants to this petition, and as to whom it has been taken *pro confesso*, he will report thereon also.

Per Curiam. Order accordingly.

NOTE.—The act of 1812 (1 Rev. Stat., ch. 85, sec. 7,) is contained in the Revised Code, ch. 82, sec. 6.

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[308] MARK H. PETWAY, Ex'r. of JOHN POWELL, *v.* MARY G. POWELL et al.

Where a testator, in the first clause of his will, gave certain slaves to his wife for life, and afterwards to his children, "to be equally divided between them, share and share alike," and, in a second clause, gave his children "all the balance of his estate, to be equally divided among them, share and share alike—and in case either one of his children should die, before it arrived at lawful age, and leaving no child or children, then his or her share to be equally divided among the surviving ones;" *it was held,* that upon the death

of one of the children, *all* the property bequeathed to such child by the will, and not the "balance of the estate" only, mentioned in the second clause, went to the survivors, particularly as the testator, in a subsequent clause, declared, that by the expression "shares of his children," he meant all that they took under his will.

Where a legacy is given to a described class of individuals, as to children, in general terms, and no period is appointed for the distribution of it, the legacy is due at the death of the testator; the payment of it being postponed to the end of two years after that event merely for the convenience of the executor in administering the assets. The rights, therefore, of legatees, are finally settled and determined at the testator's decease. Hence, children in existence at that period, or legally considered so to be, are alone entitled to participate in the bequest. And it makes no difference in the application of the rule, although the terms of the bequest be prospective, as to children begotten or *to be begotten*, and no particular time of payment is mentioned, or where the gift is general to children, with a condition annexed to it, disposing of a child's share upon his dying under the age of twenty-one years; for the fund will nevertheless be divisible at the testator's death, which necessarily excludes afterborn children.

A child in *ventre sa mere* will take a share in a fund bequeathed to children, under a general description of "children."

John Powell died in the year 1838, leaving a will, in the first clause of which he bequeathed several slaves to his wife for life, and afterwards to his children, to be equally divided between them, "share and share alike," and then proceeded as follows:

"Item 2. I give and bequeath all the balance of my estate to my children, to be equally divided among them, share and share alike; and in case either one of my children should die before it arrives at lawful age, and leaving no child or children, then their share to be equally divided among the surviving ones. The whole of this item is subject to a latter clause or the conditions stated in the next item or clause of my will."

"Item 3. My will and intention is, that my children shall be equally well provided for, and no one better [309] than another, whether they, or any of them, take from me, or under the following clause of Mrs. Mildred E. Pryor's will, viz: 'Item 2d. I leave all the balance of my estate, principally of money and slaves, to John Powell in trust, for the benefit of the children of his present wife, my daughter, Mary G. Powell;' wherefore, I direct that in case the property left by Mrs. Pryor to me, in trust for the children of my present wife,

should belong to only a part of my children, he or they thus receiving property under that will, shall have none of my estate, unless he or they shall pay or deliver over to my other children who may not be entitled under Mrs. Pryor's will, as much of the property in value by me bequeathed and devised to him or them as will make the shares of my children not entitled, equal to the shares of those entitled. By the expression, shares, as applied to my children who may be entitled under Mrs. Pryor's will, I mean the property which they may get under that will, added to that which I give them."

The testator left surviving him his widow, Mary G. Powell, and three children, John W. Powell, Mary E. Powell and Martha P. Powell, the latter of whom subsequently died, and administration upon her estate was granted to Jeremiah Brinkley. Mrs. Mildred E. Pryor, whose will was referred to in that of the testator, died on the 14th day of August 1834, having executed her said will the day before. At that time, her daughter, Mrs. Powell, had but one child, to-wit: John W. Powell, but was then *enciente* of her second child Mary E. Powell. Martha P. Powell, the third and last child of Mrs. Powell, was not born until more than two years afterwards.

The bill was filed by the executor of John Powell against his widow, and the two living children and the administrator of the deceased one, for the purpose of procuring the advice of the Court upon the construction of the will of his testator in the following particulars:

1st. Whether *all* the property bequeathed to the children passed to the surviving children upon the death of one of them, in exclusion of the widow; or whether only that portion
[310] of the testator's property passed, which was embraced in the second clause of his will, under the description of "the balance of his estate."

2dly. Whether, under the will of Mrs. Pryor, referred to in that of the testator, the deceased child, Martha P. Powell, was entitled as one of the children of her daughter, Mary G. Powell.

B. F. Moore, for the plaintiff.

Badger, for Mary G. Powell and the Adm'r of Martha P. Powell.

Iredell, for the other defendants.

DANIEL, Judge.—The first question which the parties wish this court to decide is, whether the child Martha's portion of the vested remainder in the slaves, given by Mr. Powell, in his will to his wife for life, passed, on Martha's death, to her brother and sister, John and Mary, with the "balance" of the property bequeathed to her (Martha,) under the second clause in the will of her father; or whether her mother came in, as a distributee of Martha's share of the remainder of these slaves. The testator, in his will, speaks thus: "And, in case either of my children should die before it arrives at lawful age, and leaving no child or children, *then their share* to be equally divided among the surviving ones." It is contended for the defendants, the mother and the administrator of the deceased child, that the share here mentioned was the share only of that "balance" of the testator's estate, which he bequeathed to Martha, in the second clause in the will. This Court is, however, of a different opinion. We think that all the property in possession or remainder, which the child Martha took as a legacy under her father's will, was, in his contemplation, "her share" of his estate; and, in the event which has happened, passed, by force of this disposition, to the surviving brother and sister. It is true that the testator says, his three children shall have the property given by the second clause in his will, "share and share alike." By this expression, he meant only that it should be equally divided between them. But, when he comes to speak of the possible event of one of his children dying under age, he then gives to the words, [311] "*then their share*," a more enlarged meaning. He intended, by these words, to comprehend all the property which that child, so dying, derived under his will. This intention is manifested, not only by these words, but by others, in a latter part of the will, in which the testator declares what he means by a share of any of his children. The part to which we refer, is that wherein, in consequence of a doubt whether the property conveyed to him in trust for his children, by Mrs. Pryor's will, belonged beneficially to all of them, he made a provision for producing equality, so as to make their shares, both of his

and her property, equal. "By the expression, shares," such is the testator's language, "as applied to my children who may be entitled under Mrs. Pryor's will, I mean *the property* which they may get under that will, added *to that which I give them.*"

The second question arises on the proper construction of a clause in the will of Mrs. Mildred E. Pryor. The clause is as follows:

"Item 2d. I leave all the balance of my estate, consisting principally of money and slaves, to John Powell, in trust, for the benefit of the children of his present wife, my daughter, Mary G. Powell."

At the death of Mrs. Pryor, her daughter, Mrs. Powell, had one son born, (John,) and she was then pregnant with her second child, (Mary.) Mrs. Powell subsequently had a third child, (Martha,) who is now dead. The question asked is, whether Martha was entitled to a share of her grandmother's property, thus bequeathed? Where a legacy is given to a described class of individuals, as to children, in general terms, and no period is appointed for the distribution of it, the legacy is due at the death of the testator; the payment of it being merely postponed to the end of two years after that event for the convenience of the executor in administering the assets. The rights, therefore, of legatees, are finally settled and determined at the testator's decease. Upon this principle is founded the well established rule, that children in existence at that period, or legally considered so to be, are alone entitled to participate in the bequest. 1 Roper on Legacies 48. *Van-*
[312] *hook* v. *Rogers*, 3 Murph. Rep. 178; *Jourdan* v. *Green*, 1 Dev. Eq. Rep. 270; *Knight* v. *Wall*, 2 Dev. & Bat. Rep. 125. A child in *ventre sa mere* can take a share in a fund bequeathed to children, under a general description of "children." *Doe* v. *Clarke*, 2 Hen. Black. Rep. 399; 2 Bro. Ch. Cas. 320; 2 Ves. Jun. 673; 1 Roper on Legacies 52. It makes no difference as to the application of the rule, although the terms of the bequest be prospective, and no particular time of payment is mentioned; for the fund will nevertheless be divisible at the testator's death, which necessarily excludes afterborn children. If, then, a legacy were given "to the children of my daughter, Mary, begotten or '*to be* begotten,' as

in the case of *Spracklin* v. *Rainer*, 1 Dick. Rep. 344, children coming into existence after the death of the testator would be excluded, 1 Roper 49. This rule equally applies where the gift is general to children, with a condition annexed to it, disposing of a child's share upon its dying under the age of twenty-one. The principle is this: the legacy being immediate to children, the period of vesting and division unite at the same point, viz: at the death of the testator; whence it follows that a child born after that event must be excluded. 1 Roper 49. *Davidson* v. *Dallas*, 14 Ves. Jun. 576; *Scott* v. *Harwood*, 5 Madd. 332. We are of the opinion that only the children, John W. Powell and Mary E. Powell, took the legacy under the will of Mrs. Mildred E. Pryor; and that Martha P. Powell, born after the death of Mrs. Pryor, had no interest in this fund, and consequently, nothing in it passed to her administrator.

PER CURIAM. Decree accordingly.

NOTE.—See the late case of *Vass* v. *Freeman*, 3 Jones' Eq. Rep. 221, where the subject of the vesting of legacies given to a class, as for instance to children, is fully discussed. See also *Weeks* v. *Weeks*, 5 Ired. Eq. Rep. 111.

ELIZABETH DAVES et al. *v.* WILLIAM H. HAYWOOD, Jun., Ex'r of JOHN P. DAVES. [313]

Where a testator gave all his estate, both real and personal, to his wife for her life, and afterwards to his son and two married daughters, and to the survivors or survivor of them, in case either of them should die in the lifetime of his widow, without children, but to his or her children if he or she should so die, leaving children to survive his widow; and after the death of the testator, certain lots, belonging to his estate, in the City of New York, were diminished in value by the widening of the streets in that City; whereupon assessments were made upon certain other city property to repair the injury so sustained by said lots, and the money so assessed paid into the treasury of the corporation for the use of the owners of the lots; and afterwards the widow of the testator, his son, and the husbands of his daughters, made the following agreement under their respective seals in relation to the said assessments, to-wit: the widow agreed to "relinquish to the other parties all her right and interest in said money, so that it might be received by the other parties thus:" the son one-third, and the husbands for themselves and their wives each one-third; and after a similar covenant on the part of the son, each of the husbands covenanted respectively "with the other parties (for the use of his wife or of any other person or persons who may hereafter become entitled to the

money received by him,) that upon the happening of any contingency whatsoever, that vests a right to receive said money by him received from the estate of the testator, he will repay the same or cause it to be done, but without interest until the contingency happens;" and it was stated to be "the true agreement of the parties, that the widow surrendered her interest in said money, without prejudice to the rights and interests of all the persons;" and that the covenants should be "construed for the benefit of the wives, unless they choose to execute a release in due form of law to discharge their right under this deed:" *It was held*, that upon the death of one of the husbands, insolvent, it was unnecessary to decide whether the share of the said money, which, under his directions, had been placed to his credit in bank, was real estate under the law of New York, and therefore his widow and children entitled to it as such, for that, if considered as personal estate, his widow and children were entitled to it under his covenant in the agreement, and were his specialty creditors to that amount, and that the other husband, who was his executor, should retain the assets of his testator, to the amount of their claim, against the other specialty creditors.

Edward Graham, Esq., formerly of Newbern, in this State, duly executed his last will and testament with the ceremonies required to pass real and personal estate, whether in [314] New York or North Carolina, and thereby devised and bequeathed as follows: "I give, devise, and bequeath, to the use of my dear wife Elizabeth Graham, for and during the term of her natural life, all my estate, both real and personal, whether lying and being in the States of New York, North Carolina, or elsewhere, and from and after the decease of my wife aforesaid, I give and devise all my estate, real and personal, of every nature and kind whatsoever, and wherever situated or to be found, unto my dear children, Elizabeth, Jane, and Hamilton; and in case of the death of either of my said children before the death of their mother, unto the survivors or survivor of them; but in case either or any of my said children should die in the lifetime of their mother, and leave children or child, such child or children shall take, under my will, what the parent would have been entitled to, had he or she survived his or her mother. My intention is, that the above devise to children shall extend to them, their heirs and assigns forever, after their mother's death." The wife and children of the testator, mentioned in the will, all survived him, his daughter Elizabeth being then the wife of John P. Daves, Esq.; and his daughter Jane the wife of William H. Haywood,

Jun., Esq., the defendant. After the death of the testator, the corporation of the city of New York, under authority of the laws of that State, made alterations in certain streets of the city, whereby the lots of the testator in that city, which had been devised as aforesaid, were diminished in value, and thereupon certain proceedings were had under those laws under which there was assessed, upon the owners of other real estate deriving benefit from these alterations, a considerable amount of money, to be paid into the treasury of the corporation, for the use of the owners of the lots so injured. After receiving information of their proceedings, and that the sum of money so assessed had been actually paid into the treasury of the corporation, Mrs. Graham, John P. Daves and his wife Elizabeth, Wm. H. Haywood, Jun. and his wife Jane, and Hamilton Graham, on the 16th of February 1838, executed a letter of attorney unto David Banks of the city of New York, whereby the latter was empowered and authorized to receive from the said treasury the sum of money aforesaid; and upon receiv- [315] ing the said sum, the letter of attorney declared, that the said David Banks should pay the same as follows: one-third part thereof as Hamilton C. Graham should direct him, by letter or otherwise; another third part thereof as John P. Daves should direct him, by letter or otherwise; and the remaining third part thereof as William H. Haywood, Jun. should direct him, by letter or otherwise. This letter of attorney was executed with the solemnities which, by the laws of New York, are required in instruments transferring the estates of *femes covert* there. At the time of executing the letter of attorney aforesaid, and as a part of the same transaction, another instrument was executed by Elizabeth Graham, Hamilton C. Graham, John P. Daves, and W. H. Haywood, Jun., under their respective seals, in the words following: "State of North Carolina. Whereas, certain sums of money are owing to the estate of Edward Graham, deceased, for assessments in New York, in widening Mill, Pearl and Wall streets; and whereas, the said money has been paid into the treasury of the corporation of the city of New York, for the use of said estate, and the same bears no interest, and it has been this day agreed between the parties interested as follows, to-wit: Mrs. Elizabeth Graham agrees

to relinquish to the other parties, all her right and interest in said money, so that it may be received by the other parties thus: H. C. Graham is to receive one-third; W. H. Haywood, Jun., for himself and wife, one-third; and J. P. Daves, for himself and wife, another third. But the said H. C. Graham covenants and agrees to and with the other parties, (for the use of those who may hereafter become entitled to have said sum by him received,) that if he should die before his mother, or by the happening of any other contingency the same money shall become due and payable to any other person or persons, as a part of Edward Graham's estate, then the same shall be repaid, without interest until the contingency happens. J. P. Daves covenants with the other parties, (for the use of his wife, or of any other person or persons who may hereafter become entitled to the money received by him,) that upon the happening of any contingency whatsoever, that vests a right to re-
[316] ceive said money by him received from the estate of Edward Graham, deceased, he will repay the same or cause it to be done, but without interest until the contingency happens. And W. H. Haywood, Jun., covenants and agrees with the other parties, (for the use of his wife, or of any other person or persons who may hereafter become entitled to the sum received by him,) that upon the happening of any contingency whatsoever, which vests a right in any person to receive said money (paid to him) from the estate of Edward Graham, deceased, he will repay the same, or cause it to be done, but without interest until the contingency happens. It being the true agreement of the parties, that Mrs. Graham surrenders her interest to said money, without prejudice to the rights and interests of all the persons. And these covenants shall be construed to operate for the benefit of Mrs. Daves and Mrs. Haywood, although they are severally the wives of John P. Daves and Wm. H. Haywood, Jun., unless they choose to execute a release, in due form of law, to discharge their right under this deed. In witness whereof, Elizabeth Graham, (widow,) Hamilton C. Graham, John P. Daves and William H. Haywood, Jun., have severally executed the same, this 16th February 1838. The parties referring for certainty, as to the sums by them, or any of them, received, to the records and proceedings of the corporation of New York."

The letter of attorney to David Banks was forwarded by mail from Newbern, on the 28th February 1838, and with it was transmitted a letter of that date from John P. Daves unto said Banks, in which the latter was instructed to deposite his (the said Daves's) share or third to his credit in the bank of New York, and send on to him a certificate of the deposite as soon as possible. After the receipt of the letter of attorney, and of the letter from John P. Daves, viz: on the 20th of March 1838, David Banks received, as the attorney of all his principals, the full amount of the assessed sum; and, on the 22d of March 1838, in pursuance of the instructions in Mr. Daves's letter, deposited the one-third of the net amount, that is to say, $3,548 75, in the bank of New York, to the credit of John P. Daves. On the 21st of March, the day intervening between that on which Mr. Banks received the amount of [317] the assessment, and that on which he made the deposite of the third of it to Mr. Daves's credit, the latter died, at Newbern, having previously made his last will and testament, which has been duly admitted to probate, and whereof the defendant, Wm. H. Haywood, Jun., one of the executors therein named, has solely undertaken the execution. Very soon after the death of the defendant's testator, it was discovered that his estate was not only insolvent, but was inadequate to the full payment of even his specialty debts.

This bill was filed by Mrs. Elizabeth Daves, the widow of the defendant's testator, and her infant children; and the object of it was, to have her and their right to the said sum of money, so remaining in deposite, or the amount thereof out of the assets in the hands of the executor, declared and established; and to have the same so secured and invested as it might be enjoyed according to her and their rights, and the rights of those who may hereafter become thereunto entitled. This claim the plaintiffs rested upon two grounds. In the first place, they insisted that the compensation assessed for the injury sustained by the lots which were of the estate of the late Mr. Graham, is, by the law of New York, a substitute for so much of the real estate whereof the owners had been divested; that although it be in its form *money*, yet, as the substitute for real estate, it has the properties of real estate; and, therefore, in this Court,

is to be regarded as *land;* that under the will of her father and surrender of her mother, Mrs. Daves is entitled to the present enjoyment of one-third of such real estate; that the deposit of the money, the substitute for, and representative of, that one-third, to the credit of her deceased husband, under the circumstances herein stated, did not change its character; that the executor ought not to take it as a part of the assets of his testator, but should, under the directions of the Court, perform the necessary acts for causing it to be applied according to the present and future rights of the plaintiffs therein. But, in the second place, they insisted that, waiving the inquiry whether the money so deposited be real estate, and admitting that it may be regarded as part of the personal assets of the
[318] testator in the hands of the defendant; yet the covenant herein before stated, of the testator, made by him to the defendants, with others, is, in the contemplation of this Court, in effect, made with these plaintiffs, for whose benefit the same was executed; that no action of law can thereon be sustained, because, in such action, the defendant would be a necessary party plaintiff, as one of the covenantees, and also the party defendant, as executor of the covenantor; that by reason of the application of the money so received by the testator, and of his insolvency, the covenant aforesaid is broken; and those for whose benefit it was made are, in this Court, to be deemed creditors of the testator by specialty; and that it is the duty of the defendant to retain, out of the assets in his hands, a sum sufficient for the discharge of this their demand, in preference to others of equal degree.

In regard to the law of New York, the answer set forth the statute of the State of New York, under provision of which the assessment for damages to the city lots was made, and stated that the defendant, being solicitous to learn the character of money so assessed, applied to an eminent jurist of the State for information; and, from the information thus received, he stated "that compensation for damages, because of street improvements, is, by law, awarded to the owners, lessees, parties and persons respectively entitled to an interest in such lands, according to their just rights therein;" that, although no judicial decisions have been made, "it is believed that the Courts there

would regard the money as a substitute for the land; so that, upon the death of the owner, before receiving the money, the same would descend to his heirs, and would be liable to the dower of the widow; and if the money be paid over to the husband of a *feme covert*, the owner, with a reservation of all rights, it would no more belong to him than her land, whereof he might be in possession." In regard to the "agreement" of the 16th February 1838, whereunto the defendant was a party, he said that the design of the parties was not as explicitly declared therein as it would have been, if any one of them had anticipated the insolvency of either of the others; but declared that it was fully understood that the arrange- [319] ment thereby made was in no way to affect, change or alter the rights and interests of the wives of the testator and of the defendant, to the money, the subject of the arrangement. If, in the opinion of this Court, the executor had a right to retain against the specialty creditors of his testator for the sum $3,548 75, claimed by the bill, he admitted assets to that amount, and submitted that a decree might pass against him therefor.

Badger and *Devereux*, for the plaintiffs.

W. H. Haywood, for the defendant.

Gaston, Judge, after stating the case as above, proceeded as follows: The Court has felt much perplexity in forming an entirely satisfactory opinion in this case. Upon the best consideration, however, which it has been able to give to the case, it is of opinion that the plaintiffs are entitled to relief upon the second ground taken by them in their bill; and, being of that opinion, it forbears from forming any judgment upon the first ground, as not necessary for the purposes of justice. Nothing, indeed, short of necessity, could induce us to make a judicial decision upon questions involving the construction of the law of New York, where that law has not been settled by the decisions of its domestic tribunals. In undertaking such a duty, with the very imperfect lights we have, we could scarcely hope to avoid error. It has been by no means an easy task to fix the meaning of the agreement of the 16th of February 1838.

The subject matter of that agreement was money, paid into the treasury of New York, for the use of the estate of the late Mr. Graham; and if to be regarded as money to all purposes, yet, as the proceeds of property disposed of by his will, it was subject, as far as money could be, to the limitations in that will declared in regard to all his property. According to these limitations, Mrs. Graham was entitled to the use and benefit of it for the term of her life; but who were to be the proprietors of it after her death, was then unknown. If her children, Hamilton Graham, Mrs. Daves and Mrs. Haywood should all survive their mother, they are to have it as tenants in common.

If one or more of them should die before their mother,
[320] and die childless, it was to vest in the survivors or survivor wholly. But, if any of them so dying before their mother should leave children, then such children were to take the share which the father or mother would have had, if surviving Mrs. Graham. It is to be remarked, too, that Mrs. Graham had not only the interest in this money during life, under her husband's will, but that she was wholly and solely the executrix of that will. It cannot be supposed, unless the agreement explicitly so declared, that it was the intent of the parties to the agreement, to affect thereby the ultimate rights in contingency. And, so far from such a declaration, the instrument, in the strongest terms, disclaims such a purpose: "It being the true agreement of the parties, that Mrs. Graham surrenders her interest to said money, without prejudice to the rights and interests of all other persons." The agreement contains no words of gift, sale, transfer or assignment; will be found to use no technical terms; and professes merely to set forth an arrangement which has been made in respect to the receipt, custody and future forth-coming of the money. In the beginning, it declares Mrs. Graham to relinquish, and, in a subsequent part, she is said to surrender, her interest therein. But, manifestly, these terms cannot be understood to mean a technical surrender; for there can be no surrender of a particular estate, except to those having a vested interest in remainder or reversion. They mean no more than her consent to forego the exercise of her right to the use of this money, and to permit the enjoyment of it by others. The inquiry is, who are those

for whose benefit she has, in this sense, relinquished her interest; and the answer, we think, must be, her children. It was a natural direction for her benevolence to take, from the promptings of maternal affection; it was a proper direction, as one conforming most to the spirit of her husband's will. Although these children had no vested interest in the money, yet they stood in the foremost rank of expectants, and were the persons most likely, according to the course of nature, to become entitled to it. The money was lying in the city treasury inactive; she did not want the use of it, and she was willing that her children might use it during her life. The money, too, was the substitute of, and equivalent for, real estate; and whether it had or had not the properties of such, it was natural for all concerned and intending to carry out fully [321] the late Mr. Graham's will, to make all their arrangements so as to secure the enjoyment of it, as it would have been enjoyed, if real estate. And this purpose, we think, is substantially admitted by the answer, and may be collected from the instrument, when its different parts are attentively considered. The instrument purports, in the commencement, to be made for carrying out into effect an agreement in relation to the money so paid in for the estate "between the parties interested." It cannot be questioned, we think, but by these words are intended Mrs. Graham on the one part, and her children on the other; for though, in the strict sense of the words, they were not interested in the estate, yet they were the persons most likely to be interested therein; and, in common parlance, might have been spoken of as persons actually interested. This agreement, then, is set forth, viz: that she is "to relinquish to the other parties" her interest in the said money, so that it may be received by the other parties. The instrument then proceeds to state *how* it is to be received by the other parties, viz: thus: H. C. Graham is to receive one-third; W. H. Haywood, Jun., for himself and wife, another third; and J. P. Daves, for himself and wife, another third. If the phrase had been, W. H. Haywood is to receive for his wife one-third, and J. P. Daves is to receive for his wife another third, perhaps the intent of the agreement would have been more clearly manifested, that in thus receiving, the husbands were but the

agents whereby their wives respectively were to receive. Yet the words employed are not unapt for the purpose of declaring that they take in right of their wives. The benefit of this surrender was for the wives; but, as during the coverture, the money would be held by the husbands, without accountability for interest, the money might thus be said, without impropriety, to be received for themselves and their wives. The words are plainly inconsistent with the supposition of a gift of Mrs. Graham's right to *the husbands*. Then follow the covenants of the son, and of the husbands of the daughters. The son had received a third of the money for himself, as of the bounty of his mother. The only purpose proper to be
[322] secured by his covenant, in relation to this money, was to have it forthcoming to answer the ulterior purposes of his father's will, if, by any casualty, the property thereof, instead of vesting in him, as was anticipated, should vest in some other person or persons—and his covenant is so drawn accordingly; and it is expressed to be for the use of those "who may thereafter become entitled to the said sum by him received." The covenants of the husbands are in different words; and, it must be admitted, are more obscure. J. P. Daves covenants with the other parties—*here* intending, no doubt, the parties executing the instrument—"for the use of his wife, or any other person who may hereafter become entitled to the money received by him—that upon the happening of any contingency whatsoever, that vests a right to receive the money by him received from the estate of Edward Graham, deceased, he will repay the same, or cause it to be done, but without interest until the contingency happens."

Upon *these words*, it is not clear but that it was the sole purpose of the covenant, to secure the forthcoming of the money at the death of Mrs. Graham, either to his wife or to any other person or persons who might then, according to the provisions of the will, be entitled to the ownership of it. And some weight seems to be given to this construction, by the phrase "any contingency which *vests a right* to receive it." We rather think, however, without examining the instrument further, that the covenant ought to be interpreted in a broader sense. It is reasonable to intend it to have been designed to cover the per-

formance of all the duties imposed by, and resulting from, the arrangement testified by the instrument. The money received by him, under it, was received *for his wife*, to whom the use thereof had been relinquished by Mrs. Graham. It became his duty to preserve the fund inviolate, as well for her benefit as for the benefit of all who might be interested therein. His agency, as husband, would terminate with the marriage. If, at the termination of the marriage by his death, Mrs. Graham should be alive, then, under the arrangement, his wife was entitled to the use of the money, and therefore entitled to receive it; and in case she should ultimately survive her mother, would become entitled to keep it as owner; but if Mrs. [323] Graham should survive her, then the right to the property would go over, under the special limitations of the will, to her children, or to her brother and sister. If the marriage should not terminate during Mrs. Graham's life, then, both the temporary interest and the final property in the money would be Mrs. Daves's, and of course, by the operation of the law, become absolutely his; and if it terminated during Mrs. Graham's life, by the death of Mrs. Daves, he, as husband, was to succeed to her right therein, as so much money, under her mother's relinquishment, or by way of analogy to the law of curtesy, in respect of real property. The covenant, therefore, if it means any thing, must be interpreted to have been *designed* as a security for rights that were to be called into active existence by the contingency of his dying before his wife, and during the life of Mrs. Graham; and, it is fair to hold, upon the strong and general terms used, that *all* rights, whether of his wife or others, thus depending thereon, were to be protected by that covenant. Nor is there much force in the inference drawn from the technical import of the words "vest a right." Throughout the instrument, technical terms are scarcely to be found at all. And, in the immediately preceding covenant of Hamilton Graham, where the phrase "vest a right," in its technical sense, would have been peculiarly appropriate, (for, upon the contingency there contemplated, the right to the money would *vest* under the will of Mr. Graham,) the technical phrase is not used, but instead thereof, are found the inartificial expressions "whereby the same shall become due and payable." But what

ever interpretation we might put upon these covenants, *per se*, without further explanation, we think a sufficient explanation for the purposes of the present inquiry is afforded in a subsequent part of the instrument. It is declared that "these covenants shall be construed to operate for the benefit of Mrs. Daves and Mrs. Haywood, although they are severally the wives of J. P. Daves and Wm. H. Haywood, unless they choose to execute a release in due form of law, to discharge *their right under this deed.*" Now, no right was, or could have been derived to them, *under this deed*, but what passed thereby
[324] from Mrs. Graham; that is to say, a right to the money during her life. It is expressly provided that the covenants shall operate for *their benefit*, unless they release *this* right. The covenants therefore must be construed to operate for the protection of this right, and to stipulate against the only injury which this right could sustain, by providing that the money should be forthcoming to the wife, if the husband should die before her, and during the continuance of this her temporary interest. In the case of *Benbury* v. *Benbury*, decided at this term, the principle was clearly recognized, that beneficial interests of this description, secured by the covenant of a testator or intestate, are, in the administration of his assets, to be regarded as of the same dignity with the claims of specialty creditors; and that, where the executor or administrator is the person in whose name the legal right on the covenants must be asserted, it is his duty to retain assets for their satisfaction, as against creditors of equal dignity.

It is the opinion of the court, therefore, and will be so declared, that the defendant do pay into this court the sum of $3,548 75; and that the same shall be secured under a scheme, to be approved of by the court, according to the rights of the plaintiff Elizabeth therein, under the agreement aforesaid, of the 16th February 1838; and the rights of the infant plaintiffs, and of any others who may hereafter claim, under the limitations in the will of the late Mr. Graham. And the cause is reserved for that purpose, and for further directions.

PER CURIAM. Decree accordingly.

NOTE.—See the note to the case of *Benbury* v. *Benbury*, ante 235.

BALIE PEYTON et Uxor et al. *v.* RICHARD J. SMITH, Adm'r of MAURICE SMITH, et al. [325]

Executors and administrators are chargeable with interest on balances in their hands, whenever those balances have accumulated beyond the exigences of administration, unless it appears that the fund has been kept *sacred* and *intact* for the *cestui que trusts*, as their property, ready to be delivered over to them, so that profits could not have been made thereof.

A father cannot appoint a guardian for his children, nor impose on any one the duties and obligations of that office, except "by deed executed in his life-time, or by his last will and testament, in writing," as prescribed by the act of 1762 (1 Rev. Stat. ch. 54, sec. 1.)

Where it can clearly be collected from the will of a father, that certain persons are thereby appointed to have the custody of the persons and the estate of his children, until they arrive at age, such an appointment will be held to constitute them guardians, as though the appropriate term had been used. But where a term so well known, and of such universal use to describe the office, is not employed by the testator, there ought to be unequivocal indications of a purpose to confer the office, before the court will declare it conferred. Hence, a direction by a testator, that the use of his property shall be with his wife, for the support of her and the children, subject to the supervision of his executors, until a division of it can be conveniently made, either in kind or in the form into which the executors may convert it, between the wife and children, will not constitute the executors guardians of the children.

A clause in a will, giving "full power and authority" to the executors to dispose of any part or all of the property devised or bequeathed, which they might think best, and from time to time make distribution among the wife and children of the testator, does not enjoin upon the executors the duty of putting out the balances in their hands, from time to time, for the purposes of accumulation, so as to charge them, upon failure to do so, with compound interest.

Generally, the court, upon a bill filed for the settlement of an estate, will rely upon the judgment of the master in the allowance of commissions to the executor or administrator; but if it appear that the rate of commissions has been passed upon and fixed by the County Court, the Court of Equity will follow that as the safer guide.

A sum paid to the widow of the testator by his executor, as, and in lieu of, the distributive share to which she became entitled by dissenting from the will, is not a disbursement, on the payment whereof the executor can claim a commission.

Courts of Equity view with jealousy contracts made by a trustee with his *cestui que trust*, as, for instance, a purchase by an administrator, of his distributive share, from one of the next of kin. But whether the purchase in any particular case ought to stand, is exclusively a matter between the parties to the contract. As to all others, it must be understood as [326]

transferring the right which it professes to sell; and the price paid by the purchaser is a matter which concerns none but the parties. If not made for the other next of kin, they can take no benefit from it.

It is a general rule that a trustee shall not be allowed to retain to himself profits made upon the use of the property of his *cestui que trusts*. These profits are in the nature of fruit and increase, and belong of right to the owners of the property. It is seldom practicable, however, to ascertain with precision, when trust funds have been misapplied, the exact gains therewith made, and therefore it has been found necessary to adopt a general rule, which substitutes as the measure of profits what the law or the usage of the country regards as the ordinary fruit or produce of capital.

Where the breach of trust is accompanied with corruption, and there is reason to believe that the general rule is an inadequate measure of the wicked gains actually made, the court may, and sometimes does, direct rests in taking the accounts so as to render the trustee chargeable with compound interest.

Where a trustee withholds from his *cestui que trusts*, for many years, a reasonable explanation in regard to the custody and management of their money, it is to be taken that he has not actually and *bona fide* kept it for their benefit.

If an executor place the trust funds to his individual credit in bank along with his own, he cannot be said not to have used those funds, because he thereby increases his personal credit at bank; upon his death the funds became assets in the hands of his personal representative, and cannot be claimed as assets of the testator by a personal representative of that estate; they are liable to his creditors, and are, in all respects, his property; he being chargeable with the amount thereof, in account with his *cestui que trusts*.

An executor, who is chargeable with interest on the funds of the estate in his hands, will be charged with interest on his receipts, whether they be of principal or interest.

If the executor of a will in which a father has made bequests for the use of his children were, after the appointment of a guardian for the children, to cause such guardian to resign or be removed, for the fraudulent purpose of preventing his, the executor, being called to an account for the management of the estate, and of keeping the moneys thereof in his own hands, he would be held by the court to the most rigorous measure of accountability which the law would permit.

If the master allow items in an executor's or administrator's account, without vouchers therefor, and do not state the evidence upon which the allowance is made, the items will, upon an exception taken to them, be again referred to the master, that he may revise them and set forth the grounds of his allowance, so that the court may be enabled to decide upon the correctness of his judgment.

An executor is entitled to commissions on the interest accrued on his receipts and disbursements, or, which amounts to the same, to have the commissions calculated on the amount of the receipts and disbursements, as swollen by the interest added thereon.

One tenant in common has a right to charge his co-tenant with a just proportion of the expenses incurred in relation to the common estate.

It is against the usage of the Court to act upon matters of account *originally*. They must first be referred to the Master for a report.

One-third of the rents of land in which a widow is entitled to dower, in equity belongs to her or her representative.

William Smith, formerly of Warren county, departed this life in the month of July 1818, having first duly executed his last will and testament, whereof he appointed John R. Eaton, Charles Baskerville, William Baskerville, and his brothers, Alexander Smith and Maurice Smith, executors. The will was duly admitted to probate; and all the other persons nominated as executors having refused the office, at the November term 1818, of Warren county court, Maurice Smith qualified as executor thereto. By the said will, the testator devised and bequeathed as follows:

"I give and bequeath unto my daughter, Mary Nuttall, the second and fourth bonds due unto me from Alexander Boyd, Senior, of Mecklenburg county, Virginia, being $10,000 each, to her and her heirs forever; but, at the same time, she is to be barred from compelling my estate to account to her, at any future day, for any part of the estate of her deceased husband, John Nuttall, until after my other children shall have received in equal degree from my estate. I also bequeath to my said daughter, Mary, one choice negro girl, my riding chair and harness, and a horse, called Doctor. It is further my will and desire, that my daughter, Mary, shall have all the household and kitchen furniture which I bought at the sale of her deceased husband; which said furniture shall not be taken into view in the distribution of my estate, being in consideration of services rendered by her. All the rest and residue of my estate, of every description, to be and remain in the hands of my wife, under the directions of my executors, for the use and benefit of my said wife and family, with full power and authority to my executors to dispose of any part or all of said property, which they, or a majority of them, shall think proper or best for the estate; and, from time to time, make distribution among, or purchase for, my wife and children, as they may think best, until they have given to each of [327] my other children equal to what Mary Nuttall has by this will, (leaving her furniture out of view,) then, if any thing, divide it equally between my said wife and all my children,

viz: Charles, Mary, Elizabeth, Samuel, Nancy, John and William, to them and their heirs forever."

The wife and children of the testator all survived him. Mary Nuttall afterwards intermarried with John C. Goode, of the State of Virginia, and died, leaving three infant children, Mary J. Nuttall and Agnes and Elizabeth Goode; and administration upon the estate of the said Mary was granted to her husband, the said John C. Goode. Elizabeth, one of the said William's children, intermarried with one Henry C. Williams, who hath since died. William, another of the said children, died in June 1827, at a tender age, and Maurice Smith administered on his estate; and Ann, another of the children, intermarried with Balie Peyton. Charles, John and Samuel, the other children of the testator, are yet alive. Lethe Smith, the widow of the testator, dissented from the will of her husband in due form of law, and had her dower assigned in his real estate; and having afterwards intermarried with Francis Pugh, the said Francis and herself brought their suit by petition, in the County Court of Warren, against the executor and the legatees of her first husband, for a distributive share. This suit was carried up by appeal to the Superior Court of Warren; and while there pending, viz: at the October term 1830, it was compromised, by an arrangement between the petitioners and the executor, for a sum certain, paid by him to the petitioners; the suit was dismissed, and the said petitioners executed a release of all demands to the executor. A bill in equity was also filed by the said Pugh and wife, against the said Maurice Smith, as administrator of William Smith the younger, to recover the distributive share of his personal estate, to which Lethe Pugh was entitled, as the mother of the said intestate. This equity suit was compromised, at the same time, for a certain sum paid by the said Maurice Smith; and thereupon the suit was dismissed, and a release and a conveyance of their interest in said estate executed by the said Pugh and wife unto the said Maurice. In the month of March 1827, Charles
[328] Smith, for a valuable consideration, made a conveyance to the said Maurice, whereby he professed to convey all the interest of the said Charles in the personal estate of his father; and in December 1827, shortly after the death of his

brother William, sold to the said Maurice, and executed a deed, which purported to convey to the said Maurice all his, the said Charles's interest in the personal and real estate of his said brother, as also his interest in the real estate of his father, in North Carolina and Virginia.

On the 21st of November 1832, this bill was filed. The plaintiffs were, the said Balie Peyton and Ann his wife, Elizabeth Williams, Charles Smith and John G. Smith; and the defendants were, the said Maurice Smith, Samuel Smith, John C. Goode, Mary J. Nuttall, and Agnes and Elizabeth Goode. The great object of the bill was, to have a full settlement with the defendant, Maurice Smith, as executor of William Smith the elder, and administrator of William Smith the younger, in regard to the estates confided to his care. In the bill, many grave charges of mismanagement and breach of trust were distinctly preferred; of which, at present, it is necessary to consider particularly the following: It was charged that, soon after the death of William Smith the elder, Thomas Hunt was appointed, by the County Court of Warren, guardian to the plaintiffs, Ann, Elizabeth, John, and the defendant, Samuel; and gave ample security for the care and improvement of their estates: but the said Maurice, by threats or other means, caused said Hunt to resign the guardianship; and that, having thus prevented them from having a guardian, who would have been, by law, bound to secure their estates, and by lending out the productive part thereof, every year, to cause the same to accumulate until their arrival at age respectively, the said Maurice had subjected himself to the responsibilities of a guardian, and was not only bound to account with the said legatees for interest, but for interest annually, to be compounded. It was also charged that the said Maurice, for many years, had had in his hands a very large amount of money, belonging to the estate of his testator; which sums of money he had been using for the purposes of gain—buying therewith [329] stock in Banks—loaning the same out at interest—buying of notes—dealing in exchanges, and other operations of a like kind. It was also charged that James W. Smith, the brother of the testator, owed the testator, at his death, two bond debts, one for the sum of £450, Virginia currency, and the other for

an amount unknown to the plaintiffs; and that the defendant, Maurice, had neglected to collect them; that the testator, at his death, was interested, as a co-partner with the said James, and Robert Burton, in the purchase of certain tracts of land in Tennessee; and the said Maurice, in settling the said co-partnership account, either from facility of character, or from a disposition to oblige the said James, had allowed the said James, who resided in Tennessee, most extravagant charges for personal services rendered in relation to the concerns of the co-partnership; and had, moreover, allotted to Samuel G. Smith, a son of the said James, one-eighth of a 5,000 acre tract of land, in that State, for very inconsiderable services. It was also charged, by the plaintiff Charles, that the conveyances made by him of his interest in the estate of his father and of his brother, were obtained from him at an under value, when the said Charles was ignorant of the value of said estates, and in great distress for money; and that the same ought not, and would not, be deemed, by this Court, other than as securities for the moneys he had received thereupon. And it was further charged that the purchase made by the said Maurice Smith, of the interest of Francis Pugh and Lethe his wife, in a distributive share of the estate of his testator, and also the purchase of their distributive share in the estate of William Smith the younger, were made in behalf of the persons interested in said estates; and, therefore, ought to enure for their benefit. Upon these and all the charges in the bill, the most searching interrogatories were propounded to the said defendant. The answer of the defendant, Maurice Smith, was put in on the 9th of March 1833. To it were appended, as exhibits, a copy of an account taken, and of a report made, by the commissioner, in the petition of Pugh and wife, in the County Court of Warren, against the said Maurice and the legatees of William Smith the elder,
[330] for the purpose of ascertaining the amount of the personal estate of the testator then reduced into possession; also, further detailed accounts of his administration subsequently to the said account and report, which he averred to be full and true. He denied that he ever speculated with the funds of his testator, to make profit for himself; declared that he had charged himself with all the interest he ever received on money

or claims of the estate; that he had never used for himself, or loaned on his own account, any part of said estate; and that he had, at all times, been in possession of all the money of his testator, that was collected and not regularly disbursed, either by having the same at his own house, or about his person, or in deposit with some of the Banks in North Carolina or Virginia, excepting some small sums, at different times in the hands of James W. Smith, which were held by the said James to meet incidental charges upon the estate in Tennessee.

In relation to the charge respecting the agency of the defendant, in causing Thomas Hunt to resign the guardianship of the children of William Smith, he answered, that he believed that Thomas Hunt was appointed guardian to some of them, and that he resigned the guardianship; that having learned that the said Thomas was embarrassed and insolvent, this defendant, in pursuance of advice, was about to endeavor to have him removed from office, when the said Thomas resigned; that he did not improperly control or menace the said Thomas; that he believed the said Thomas resigned because he apprehended that he would be removed; that the defendant, far from being actuated by the base motives attributed to him, was governed solely by the desire to prevent the estates of his brother's children from being squandered, and a conviction, strengthened by the advice of eminent counsel, that he owed this interference to them as a duty; and that he was now convinced, that so far as this interference contributed to produce the resignation of the said Thomas, it was eminently beneficial to the plaintiffs; for, shortly thereafter, it became manifest that the said Thomas was utterly insolvent; and it has since been discovered that the bonds given upon his appointment, as guardian, because of technical defects, could not have been enforced at law.

He further said, on this subject, that it was always his [331] desire that his brother's children should have guardians; that he refused to take upon himself the office of executor, until their maternal uncle, John R. Eaton, consented to act as their guardian; that the said Eaton was appointed accordingly, but shortly afterwards resigned; that Alexander Smith was at one time appointed guardian to the plaintiff Charles, and Thomas Turner to the plaintiff Elizabeth; but both became wearied

or dissatisfied in a very short time, and resigned their offices. He further answered, that he knew nothing of the note or bond for £450, Virginia money, alleged in the bill to have been due to his testator from James W. Smith, excepting from the statements of said James, from which it appears not only that the same is not due, but that the said James is a creditor of his testator's estate. The defendant filed, as exhibits, copies of the accounts and reports of James W. Smith, in relation to his transactions as agent of the testator in his lifetime, and as agent of the estate since the death of the testator, and a copy of the settlement made between the defendant and the said James; and averred that he had not allowed thereon any item to the said James which he was not satisfied was just, nor allowed him any compensation for services which was not, in his judgment, fair and reasonable; stated that, upon the said settlement, a balance was found against the said James; the same was thereupon received by him, and passed to the credit of his testator's estate. He further said that he understood there was a copartnership between the testator, Robert Burton, and the said James, in relation to a claim to a tract of five thousand acres of land in Tennessee, of which concern the said James was the manager; and that, for important services rendered to the concern by Samuel G. Smith, there was allotted to the said Samuel an interest to the amount of one-eighth in the claim; that the defendant was convinced that the compensation so allowed was reasonable, but if it were in any respect improper, he was advised that it was an affair in which he had no concern, and for which he was in no way responsible. The defendant denied that he took advantage in any way of the ignorance, inexperience, or necessities of the plaintiff Charles,
[332] in the purchase made of his interest in the estate of William Smith the elder, and William Smith the younger; insisted that these purchases were fair, for full value, and absolute; and, although declaring that it was never his purpose to make any profit thereon, did not waive his right to insist on them, in this suit, as absolute conveyances. The defendant admitted distinctly, that the release made by Pugh and wife, on the settlement of the suit by petition, in Warren, was made for the benefit of the estate of his testator, and had always been

so regarded by him; but he insisted that the transfer, made to the defendant, of Mrs. Pugh's interest in the estate of William Smith the younger, was a matter wholly between Pugh and wife on the one side, and the defendant on the other; not made for the benefit of the other next of kin of the said William; and, therefore, that it neither enlarged nor diminished their rights, as against the defendant. Upon the filing of this answer, it appeared that "the defendant, submitting that the plaintiff, John G. Smith, would be entitled to receive, at least, the sum of $10,000 of the money, which, by his answer, he hath admitted to be in his hands, upon any probable estimate of the estate of his testator, and that he is ready to pay the same into court to, and for, the use of said John;" the said defendant was thereupon ordered to pay the same into the office of the Clerk and Master, before the 2d day of the then next ensuing Granville County Court; and, in regard to the residue of the sums stated in the answer to be due to the estate of William Smith, which, by said answer, the defendant had submitted to pay into Court, the plaintiffs not making any motion, it was, on motion of the said defendant, ordered, that he should have leave (whenever the parties should all be properly brought before the Court,) to pay the same into the said office, for the benefit of those who might be thereunto entitled. At the same term, leave was given to the plaintiffs to except or reply to the defendant's answer at the next term. In pursuance of these orders, the said defendant, on the 11th March 1833, paid the first mentioned sum of $10,000, into office, for the use of the said John; and on the 7th of September 1833, paid into office, for the benefit of those thereunto entitled, the sum of $7,179 13. The defendants, Samuel Smith and Mary [333] J. Nuttall, Agnes Goode and Elizabeth Goode, (the three latter by their guardian,) answered the bill. The former stated that he believed and admitted the several matters charged in the bill to be true, and submitted to join in the account thereby prayed for; and the three latter submitted their rights to the protection of the Court. Publication was made to the absent defendant, John C. Goode, and the bill, as to him, taken *pro confesso*. At the September term 1833, it was ordered, "on motion of the counsel for the plaintiffs, and the counsel of all

the parties, except the defendant Maurice Smith, that the moneys paid into the office shall be paid out to the plaintiffs and defendants in such proportions as they shall agree, except the sum of $483 74, stated in the answer to have been received by Maurice Smith, as one-third of the rents of Tennessee lands, whereunto Mrs. Pugh was entitled to dower, which sum shall be retained until the further order of the Court." It was also ordered, on motion of the counsel for the plaintiffs, that it be referred to the Master of the Court, to take the accounts involved in the pleadings, and that he have leave to examine the defendant, Maurice Smith, on interrogatories; the reference to be without prejudice to any of the matters of defence set up in the answer of the said Maurice, or of any rights appearing on the pleadings inconsistent with such reference. It did not appear that a formal replication was entered to the answer of the defendant, Maurice Smith; but the parties must have understood that the answer was put in issue, not only because of the plaintiff's failing to except to the answer, under the special terms of the order of March 1833, but because immense volumes of testimony were taken under commissions issued on the application of the plaintiffs and the said defendant, to impeach, on the one hand, or to support, on the other, the averments of the answer. Before the Master concluded the reference, or the parties their proofs, the defendant, Maurice Smith, died; and thereupon the plaintiffs filed their bill of revivor against Richard J. Smith, the administrator of said Maurice, and the cause was duly revived against him. The Master having fi-
[334] nally made his report, and the cause being set down for hearing upon the proofs, the said report, and the exceptions thereto, the same was removed into this Court to be heard accordingly.

The report of the Master set forth, in the first place, an account of the executor with the estate of his testator, for the purpose of ascertaining the net value of said estate. This account was made upon the principle that the representatives of Mary Goode, formerly Nuttall, and Francis Pugh and wife, were not entitled to receive any thing more from the will of the testator; because, as to the former, the estate would not be sufficient to make the shares of Mary Nuttall's brothers and

sisters equal to her legacy; and, as to the latter, their interest had been released to the executor, for the benefit of the estate. By that account, it appeared that the executor was charged with assets to the amount of $137,900 42; and was credited for disbursements and charges of administration in the sum of $53,081 81—(exclusive of advances made by him to the several legatees, which were charged in their respective accounts) —and was further credited with 5 per centum commissions on the amount of the assets received, and a like commission on his disbursements, leaving a balance thereupon due to the estate, if interest be not calculated on either side of the account, of $76,039 37. The commissioner submitted to the Court the question, whether interest ought to be charged in said account; and if the Court should so decide, he shewed that, by calculating interest on both sides of the account, there was a further balance due *the estate*, because of such interest, amounting to $59,440 41. The commissioner stated, also, that these balances were subject to a claim for a credit set up in behalf of Maurice Smith, because of his interest in a certain judgment against the executor of William Killingsworth, which this defendant, the said Smith's administrator, was, by arrangement between the parties, to shew thereafter. Dividing the amount of the testator's estate, thus ascertained, among the children of the testator, other than Mary Nuttall, the share of each child amounted to $12,673 32 principal money; and, if interest were to be allowed, as aforesaid, would be increased by the additional sum of $9,908 23½ interest. The report further found, that the share of William Smith the younger consisted of his [335] one-sixth, as aforesaid, of the estate of his father, and a share of certain legacies bequeathed by Charles R. Eaton, amounting together, principal money, to the sum of $13,706 64 5-6; which, by interest, would be increased the further sum of $9,977 70—and, crediting the administrator with what he had advanced for the use of his intestate, and his commissions, there would be a balance of $11,806 75½ of principal, and $9,060 85½ of interest, divisible between the mother and the brothers and sisters of the intestate—making the share of each $1,687 67 2-7 of principal, and $1,295 40 5-7 of interest. The commissioner then proceeded to state the account of each of

the residuary legatees of William Smith the elder, parties to this suit, in which each legatee was credited with the one-sixth of the net value of the testator's estate, and with the one-seventh of the net value of the estate of Wm. Smith, Jun., and charged with the advances made from time to time, by the executor and administrator; and also stated the account of the representatives of Mary Nuttall, otherwise Mary Goode, as one of the next of kin of the said William Smith the younger, in which they were credited with the said Mary's one-seventh part of said estate, and charged for advances and payments made. Upon these accounts the report found due to Charles E. Smith a balance of principal of $8,130 36, and of interest $6,084 43; to Elizabeth Williams, of principal, $287 34, and of interest $2,367 20; to Samuel W. Smith, of principal, $1,065 65, and of interest, $3,506 98; to John G. Smith, of principal, $62 37, and of interest, $6,200 66; and that there was due from B. Peyton and wife, because of overpayment of principal, the sum of $456 90; but, if interest was to be calculated, this would not only extinguish the said balance, but leave the sum of $3,660 90 due to them; and found a balance due from the representatives of Mary Nuttall, alias Goode, of principal, $303 16, because of overpayment, on account of her distributive share of the estate of William Smith the younger; which, if interest were calculated, would not only be extinguished, but leave a balance in their favor of $427 55.

[336] The commissioner subjoined to the report, that after it was closed, the administrator of Maurice Smith filed a bond of the plaintiffs, Charles E. Smith and James W. Smith, for $450 50; a receipt for an attorney's fee, paid by the intestate, of $5, and vouchers and proofs in relation to the claim therein mentioned, respecting the judgments against Killingsworth's executor.

Badger and *Devereux*, for the plaintiffs.

[337] *W. H. Haywood*, for the defendant, Maurice Smith's administrator.

[338] Gaston, Judge, after stating the case as above, proceeded as follows: The principal controversy in this case

is, whether Maurice Smith ought to be charged, in account with the estates confided to his mangement, with interest; and if so, from what time—upon what sums—and whether with simple or compound interest. These questions are presented by the pleadings, and also arise upon the exceptions; and when they are determined, there will probably be but little difficulty in making a full settlement between the parties. Nothing can be clearer, in point of principle, [339] than the general rule, that a trustee shall not be allowed to retain to himself, profits made upon the use of the property of his *cestui que trust.* These profits are in the nature of fruit and increase, and belong, of right, to the owners of the property. It it seldom practicable, however, to ascertain with precision, when trust funds have been misapplied, the exact gains therewith made; and, therefore, it has been found necessary to adopt a general rule, which substitutes, as the measure of profits, what the law, or the usage of the country, regards as the ordinary fruit or produce of capital. Where the breach of trust is accompanied with corruption, and there is abundant reason to believe that the general rule is an inadequate measure of the wicked gains actually made, the Court may, and *sometimes* does, direct rests in taking the accounts, so as to render the trustee chargeable, in effect, with compound interest. The primary purpose is, to secure to the *cestui que trusts* the profits on the use of their money; and the second, to discourage and prevent the application of trust funds to the private purposes of the trustee, a practice which, while it endangers the safety of the property, tempts to further faithlessness, and to ultimate dishonesty and corruption. The propriety of these principles is so obvious, that they could not fail to receive the sanction of the Courts of this State. Indeed, there are peculiar reasons here, which have been supposed to call for a more extended and rigorous application of the rule of accountability for interest, than that which prevails with respect to executors and administrators in the country of our ancestors. *There*, the legal, is above the ordinary market rate of interest; *here*, it is below what is deemed the common value of the use of money. While, therefore, it is usual, in England, to charge trustees, made liable for interest on trust funds, but four per centum, although

the statute rate of interest be five, here, when interest has been charged at all, it was never charged at less than six per centum, allowed by law on loans of money. With us, too, there has always been such a constant demand for money, so many temptations to adventure on schemes of profit, and such a habit of rapid investments, that the presumption against its remaining [340] idle, even in the hands of executors or administrators, was deemed not an unreasonable one. Moreover, as the law here allowed compensation to trustees of this description, by commissions, there was not the same fear of discouraging persons from accepting these offices, by a severe accountability, as is natural where their services are to be performed gratuitously. Certainly, therefore, with us, it has been the established usage to charge interest on balances in the hands of executors and administrators, whenever these have accumulated beyond the exigencies of administration, unless it appears that the fund had been kept *sacred* and *intact* for the *cestui que trusts* as *their property*, ready to be delivered over to them, so that profits could not have been made thereof.

In this case, the mass of the testator's personal estate consisted of ten bonds, each for the sum of $10,000, payable in ten successive years, by Alexander Boyd and others, of Mecklenburg, in Virginia; all of which bonds, it appears, were collected by suit, and some of them after much delay. Upon examining the accounts, taken by the Master, it appears, that after deducting a reasonable rate of commissions, for the services of the executor, there was no considerable balance of money in his hands, beyond what might be reasonably necessary to meet the charges of administration, and pay unsatisfied demands against the estate until the year 1824; when, by reason of upwards of $23,000 then received from the Boyd debts, besides other considerable collections, there remained in his hands, at the end of that year, upwards of $20,000, which balance never grew less, but, on the contrary, went on increasing. Upon the balance, at the end of this year, the Court thinks that the executor ought to be charged with interest, unless he has exonerated himself therefrom, by reason of the special matters set up in his answer. As we understand that answer, it alleges that he was unable to settle with the legatees, because they

were then under age, and without guardians; that he did not deem himself justified in lending out the money for them, or otherwise investing it for their benefit; and that therefore he *kept* it, making no profit thereof. The language of the answer, in regard to the keeping of the money, is, "that [341] he hath, at all times, been *in possession* of all the money of his testator, that was collected and not disbursed, *either* by having the same at his own house, *or* about his person, *or* in some of the banks in North Carolina or Virginia." This statement is obviously so vague, that, with all its appearance of specification, it amounts to little else than that he had the money *somewhere*, and affords to those interested, very slender opportunity of ascertaining *where*, and still less *how*, it was kept. An attempt was made to obtain specific information on this subject, by interrogatories, administered to the executor through the Master; but all thus acquired, amounted to no more than this: that the *only banks* in which *he* had made deposites were the State Bank of North Carolina, the Farmers' Bank of Virginia, and the United States Branch Bank at Richmond; and that a statement of his *entire* account, with each of those institutions, was contained in certain copies of the bank books exhibited to the Master. These accounts from the bank books, are accounts current between Maurice Smith, (individually,) and the banks, and make no discrimination between the deposites, as having been made otherwise than to the general credit of the depositor. The executor has not undertaken to specify which, if any of them, were an account of the moneys of his testator. Upon the answer and the examination, it must be held, therefore, that while the executor claims to be relieved from interest, because of his having kept the fund for his *cestui que trusts*, without having derived profit therefrom, he refuses to disclose where, or how, it was kept for them. It is impossible, we think, to account for the withholding of these reasonable explanations, on the part of a trustee, from his *cestui que trusts*, in regard to the custody and management of their money for many years, upon any principle consistent with the fact that it has been actually and *bona fide* kept exclusively for their benefit.

We must suppose, unless we attribute to the defendant, both

in his answer and upon his examination, a deliberate purpose of equivocation, that some, at least, of the moneys appearing to his credit upon these accounts, were those of the es-
[342] tate of his testator. They are not *all* such, for the account exhibits, as he alleges, *his* entire dealings with the banks; some of which, therefore, must be understood to have been his individual dealings. From these accounts, then, it is to be collected, that the trust funds went into the mass of the executor's property, and by no visible marks or signs were, in any respect, distinguished from his private moneys. They swelled the executor's personal credit at bank; upon his death, they became assets in the hands of his personal representatives, and could not have been claimed as the assets of the testator, by a representative of that estate; they were liable to his creditors; were, in all respects, his property; he charging himself with the amount thereof, in account with his *cestui que trusts.* It is impossible, upon this state of facts, to hold that the executor *did not use* the funds of the estate. He has declared, indeed, that he did not "use them for himself, or loan them on his own account, or speculate therewith to make profits for himself;" and we cannot declare his answer false, unless compelled to do so by clear proofs. But it is manifest, if credit be given to the answer, that the defendant, in denying all personal use of the trust funds, made the denial in a different sense from that in which we should have understood it, but for the explanations otherwise afforded.

This discovery may properly create doubts whether the denial that these funds had been loaned on his account, or employed in speculation, to make profits for himself, is to be taken in the sense which it would seem to import. And these doubts increase, upon further examination into the details of the bank accounts. That with the Farmers' Bank of Virginia contains but one credit for a deposite of cash, on the 19th of April 1830, of $1000; and this was drawn out on two checks of $500 each, one in favor of Webb, on the 27th of the ensuing month, and the other in favor of himself, on the 25th of February 1831. If this deposite were of the money of the estate, (and if it were not, *this* account could have been presented but for the purpose of deception,) why is the money thus withdrawn from its place

of security—and withdrawn in two sums, at distinct times? It must have been for some purpose connected [343] either with the necessities of the estate, or with the private concerns of the depositor. We have examined the account as returned by the executor, as made out by the commissioner, and no application of either of those sums at, or about either of the times, to the purposes of the estate, appears. The account with the United States Branch Bank, at Richmond, contains three deposites, two of $1000 each, made on the same day, the 24th of April 1829, the whole amount whereof, $2000, was withdrawn by "draft," on the 24th April 1830; and one of $1000, made on the 25th February 1831, of which $500 was checked for on the 29th of August 1833; and the remaining $500 yet remains standing to the credit of the depositor. If any of the money thus deposited were funds of the estate, the same inference arises, from the manner in which they were withdrawn, of their actual application to the private necessities or business of the executor. The account with the State Bank of North Carolina furnishes, as far as can be understood, evidence not more favorable to the positions taken here in behalf of the executor. It exhibits a deposite of $4000, made by him, in May 1822, and withdrawn in the succeeding year, by checks in favor of Willis Lewis, A. Paschall and T. Booth; and it is shewn that, with regard to two of these, Lewis and Booth, they got those sums on a personal loan from the executor. On the 6th and 7th of October 1824, he made deposites of $4000 and of $2200. Upon these he checked in favor of himself, on the 4th of October 1825, for $2000, and of R. Dickins & Co., for $1000. It is impossible to infer, from the accounts of the estate, that either of the sums thus checked for was applied to the uses of the estate; and in May 1826, he checked for the balance of $3200, in favor of Doctor Hunt and David Mitchell, to whom he lent the money as his own. If these, or any of these, deposites were of the trust funds, then the trust funds were, to *every intent*, employed in his private business. One other deposite alone remains, of $3000, which was made on the 14th of May 1832, and drawn out on the 31st of August 1833 by a check in favor of himself; and, probably, for the purpose of being paid in, at the then approaching

September term, on account of the parties in this suit.

[344] Now, if this last deposite be the *only* one ever made of trust funds in the banks, then these conclusions are forced upon us: First, there has been a most disingenuous mystification, in respect to the place of custody of these funds, by representing that they were kept either at home, or about his person, or in some of the Banks of North Carolina or Virginia. An equivocation of this kind ought to deprive the answer of all moral weight. We are not casuists enough to decide whether such an equivocation has *all* the guilt of falsehood; but it is decisive to shew, that he who uses it cannot be relied on as a guide to truth. Another conclusion, resulting from this view, is, that the executor deemed it prudent to deposite his own moneys, for safe-keeping, in those public institutions, established for that purpose, but kept the funds of others, committed to his care, where, no one knows, and where, he will not disclose, when called on to account for them. And, when it is remembered that he had been, before this charge was confided to him, actively employed in making loans, buying up notes and other profitable money operations, and that these were continued with undiminished activity during the entire period when these trust funds were in his hands, there is no rational ground left for doubt; and we are bound to declare that they were used *indirectly*, at least, for his personal emolument. But, on the other hand, if this last deposite in the State Bank was not the only one made of the funds of the estate, we shall be obliged, by these proofs, to pronounce, what certainly the parol evidence *tends* to shew, that the funds were used, in his private business, *directly* for the sake of profit therefrom. It is not necessary to decide between these two declarations. Charity should induce us to hope that the deceased may have thought, that while he kept on hand, at his command, an amount of money equal to what he supposed might be found due from him, on a settlement, he could say that he had not used *the funds of the estate* for profit. If it were so, it is a melancholy instance of the facility with which the love of gain leads an erring man into the strangest delusions. We pursue this unpleasant inquiry no farther; but direct that interest be charged from the close of the year 1824, on the balance then

due from the executor to the estate of his testator; and that, thenceforth, it be regularly charged and credited [345] on the subsequent items in the account.

The estate of William Smith the younger consists, almost exclusively, of *his* share in the estate of Wm. Smith the elder. It owed no debts; and interest is to be charged thereon from the date of the receipts.

On the part of the plaintiffs it has been insisted, that there should be annual rests made in the account, so as to charge the executor, in effect, with compound interest. It will be seen that, to some extent, the persons interested will, without giving the direction for rests, get the benefit of compound interest; because, the interest with which the Court directs the executor to be charged, will be calculated on his *receipts*, whether they be of principal or interest, for his *cestui que trusts*.

The claim thus advanced by the plaintiffs is rested on several grounds. In the first place it is insisted, that according to the declarations of Maurice Smith, that his dying brother had charged him with the special care of the deceased's children, the said Maurice became their guardian, and ought to be held accountable as such. This ground cannot be maintained. The power of a father to appoint a guardian to his children can be exercised only in the mode prescribed by law; and that is express, "that it shall be by deed, executed in his life-time, or by his last will and testament, in writing." Act 1762, Rev. ch. 69, sec. 2, (1 Rev. Stat. ch. 54, sec. 1.) It is then insisted that, in and by the clause where the testator disposes of the residue of his estate among his wife and children, other than Mrs. Nuttall, he constitutes his executors guardians to these children, by imposing upon them the duties of guardians. The Court admits that when it can be clearly collected from the will of a father, that certain persons are thereby appointed to have the custody of the persons, and of the estates of his children, until they arrive at age, such an appointment will be held to constitute them guardians, as though the appropriate term had been used. But, where a term so well known, and of such universal use to describe the office, is not employed by the testator, there ought to be unequivocal indications of a [346] purpose to confer the office, before the Court will de-

clare it conferred. In the clause in question there are no indications warranting such a conclusion. Certainly the clause itself is not very perspicuous; but, according to our construction, it directs that the use of his property shall be with his wife, for the support of her and the children, subject to the supervision of his executors, until a division of it can be conveniently made —either in kind or in the form into which the executors may convert it—between the wife and the children. This division necessarily means an equal division; and this division, between the wife and *these* children, is to be repeated, from time to time, until *their* shares respectively shall be made equal to the special provision made for Mary Nuttall, after which, should there be a residue, the division—equal, of course—is to proceed between the wife and *all* of the testator's children. If the supervision, which the testator directs to be exercised by his executors, constituted them guardians, they were appointed such, not only to his children, but his wife.

But it is further contended that he ought to be thus charged, because he caused the guardian of his infant *cestui que trusts* to be removed; and thereby getting the unlimited control not only over the property of his testator, but over the persons of the testator's children, he exercised the powers of guardian, and must be held to the responsibilities of a guardian. If the case were established that, after the appointment of Thomas Hunt as guardian, the executor, for the fraudulent purpose of preventing his being called to an account for the management of the estate, and of keeping the moneys thereof in his own hands, caused the said guardian to be removed, or to resign his office, we might feel ourselves justified in exacting from him the most rigorous measure of accountability which the law will permit. But this case, we are decidedly of opinion, has not been made out; nor any thing shewn in relation to that transaction, for which the executor merits censure. It appears from the records, that at February Court 1819, John R. Eaton, who had been nominated by the testator as an executor, but declined the appointment, the maternal uncle of the children, was appointed their guardian; and so far from its appearing
[347] that this was done in opposition to the wishes of Maurice Smith, he declares in his answer, that if the decla-

ration were untrue, it might have been contradicted, that *he* refused to qualify as executor, until Mr. Eaton promised to take the guardianship. Besides, this allegation derives some support from the fact that Smith's qualification as executor did not take place until the November Term 1818, although the will was proved at the preceding August Term. It also appears that in November 1819, Alexander Smith, the brother of the testator, became guardian to Charles, one of the plaintiffs, and remained guardian until February 1824. Besides, it does appear that although Thomas Hunt, when he received the appointment, was in good credit, and generally deemed solvent, a very short time justified the apprehensions of Maurice Smith, in regard to his embarrassments, and proved that, on this subject, *he* had that more minute information, and keen sighted sagacity, which are ordinarily found in pursuing habitually the business of lending money and buying in notes. Besides, when Thomas Hunt resigned the guardianship, there was no money of the testator in hand, and no immediate temptation to make Maurice Smith desire that the children should be without guardians. And upon the proofs it does not appear, that after the resignation of Thomas Hunt he executed any of the duties of the guardian, except those necessarily devolved on an executor for infant *cestui que trusts*, of furnishing the means for their support and education. It is lastly contended, upon this point, that these rests ought to be directed, because, by the will, the executor was expressly charged with the duty of putting out the balances in his hands, from time to time, at interest, for the purposes of accumulation; and that his gross breach of duty, in utterly disregarding this injunction, deserves such severe visitation. We are saved the necessity of ascertaining what ought to be the rule of interest in the case supposed—in the performance of which duty, there would be a difficulty in reconciling decisions that apparently clash with each other—because we do not find any such injunction in this will. The only power given to the executors, is that of converting the property for the purpose of a division, and the tes- [348] tator seems to have contemplated such a division, whenever the administration of his estate could be conveniently closed.

We have thus disposed of the main subject of dispute in this

cause, and of the matters embraced within the 1st and 2d of the exceptions taken by the plaintiffs, and within the 5th, 7th and 8th of the exceptions of the defendant. The report must necessarily be re-committed, in order that the accounts may be made out in conformity with the principles thus declared.

The 3d exception of the plaintiffs is, for that the Master hath credited the said Maurice with sundry small items for expenses, amounting, together, to the large sum of $1110 89, without vouchers therefor, and without proof that the expenses so alleged were actually incurred, or, if incurred, for the benefit of the estate of his testator. According to the practice which has heretofore prevailed in this Court, and which must continue until one more suited to the convenience of suitors can be established, this exception must so far be allowed as to direct the Master to revise this item; and in his report thereupon to set forth the grounds of his allowance, so that the Court may be enabled to decide, if made the subject of an exception, upon the correctness of his judgment.

The 4th of the plaintiff's exceptions, and the 6th and 10th of the defendant's exceptions, relate to the *quantum* of commissions allowed to the executor; to the subject matter of commissions, and the mode of its computation. It is so difficult for this Court to ascertain, by any means in its power, what is the reasonable rate of commissions called for in any case, by the nature of the services, labor, and responsibility of the trustee, that it is much disposed, in general, to rely, in this respect, on the judgment of the Master. In this case, however, the Court perceives a safer guide for the exercise of its discretion, and will follow that guide. It appears that, on one occasion, when the accounts of the executor were audited in the County Court of Warren, and when the auditors recommended that there should be allowed to the executor a commission of 5 per [349] centum on his receipts, and 5 per centum on his disbursements, the Court, nevertheless, ordered that his commission should be limited to 4 per cent. on each. The Court, therefore, overrules the allowance of 5 per cent. as made by the Master, and sanctions the rate established by the County Court. It is made a question by the 10th of defendant's exceptions, whether the money paid to the widow of the testator as,

and in lieu of, the distributive share to which she became entitled, by reason of her dissent from the will, is a *disbursement* on the payment whereof the executor can claim a commission. The Court holds, very clearly, that it is not. Here the payment was not made on an adjudication, but as on a purchase of the widow's right. But if it had been made on an adjudication, or in any other form, still the claim was in the nature of a distributive share, and comes within the reason of the decisions which forbid commissions on the payment of legacies and distributive shares. *Potter* v. *Stone*, 2 Hawks 30; *Clarke* v. *Blount*, 2 Dev'xs Eq. Rep'ts 51. The Court is also called upon, by the other of defendant's exceptions above stated, to correct an alleged error of the Master in the mode of computing the commissions. As the account itself is to be taken on a new principle, with respect to the calculation of interest, the object of this exception will be best attained by directing the Master, after ascertaining the amount of the receipts, as swollen by the addition of the interest thereon, and of the amount of the disbursements, as so increased, to make the allowance of commissions on the aggregate.

The 5th and 6th exceptions of the plaintiffs are either disproved or unsupported by proof; and the small matter embraced in the 7th exception is left, by the exceptants, so completely in doubt, that those exceptions are overruled.

The 8th, the 11th, 14th, 15th and 16th exceptions of the plaintiffs were abandoned, in the argument, as untenable.

The 9th exception must be overruled. The Court can discover no reason why a tenant in common of land has not a right to charge his co-tenant with a just proportion of expenses incurred in relation to the common estate; and, upon the proofs, sees no room to doubt that the payments made to James W. Smith therefor, were, in all respects, proper.

The 10th exception must also be overruled. Upon [350] the answer and the testimony of James W. Smith, which furnish all the evidence in relation thereto, it appears that the sum, for not collecting which it is sought to charge the executor of William Smith, was not, in fact, due to the said William.

The 12th and 13th of the exceptions of the plaintiffs will be considered together. Maurice Smith, who was the adminis-

trator of William Smith the younger, purchased, at a certain sum, and while a suit was pending therefor, the interest of his intestate's mother in and to a distributive share of the estate; and it is alleged, by the other next of kin, that he paid too little therefor, and that the profit made on the purchase should result to them; and if not, then, that the estate is not chargeable with any part of the costs which had been incurred in the litigation. Courts view with jealousy such contracts made by a trustee with his *cestui que trust.* Whether the purchase in this case ought to stand or not, is exclusively a matter between the parties to that contract. As to all others, it must be understood as transferring the right which it professes to sell; and the price paid by the purchaser is a matter which concerns none but the parties. The purchase is not shewn to have been made for the other next of kin; and the allegation that it was so made, has been peremptorily denied. The representatives of Mrs. Pugh are not before the Court. We see no ground on which to overrule the judgment of the Master, on the main matter of these exceptions. But it is equally clear that it was an error to allow the executor for the costs paid by him, in resisting *this* claim of Mrs. Pugh. To the extent of these, the account must be corrected.

The matters disclosed in the affidavit of Samuel W. Smith, connected with the fact that the payment in question does not appear to have been claimed by M. Smith, in the account rendered by himself, render it so questionable whether an error was not committed by the Master, in charging the said Samuel with the sum of $1500, as paid on the 25th of December 1827, that the Court sustains the 17th and last exceptions of the plaintiffs, so as to direct the Master to revise his report in relation thereto.

The Court also sustains the 1st exception, on the part
[351] of the defendant, so far as to require of the Master to review his report in relation to the payments claimed by said exception to have been paid to Charles Smith. The conveyance of the shares of the said Charles, in the estates of his father and brother, is regarded by the Court but as a security for the sums actually paid to him; and the Master will ascertain fully all that has been received by him on the account thereof.

The Court is of opinion that the 2d exception of the defendant is irrelevant. The representatives of Mrs. Pugh are not before the Court; and the Court does not understand that the report finds the late Maurice Smith liable to any person, because of her share in the estate of William Smith the younger. The value thereof is set forth, partly for the purposes of elucidation, and partly that the Court might be enabled to decree in relation thereto, if it held that the profits on the purchase of that share accrued to the other next of kin of the said William. But the report does not *charge* the said Maurice, in account with any of the parties to this suit, therewith.

The matter of the 4th exception, the claim of the late Maurice Smith, on account of his share in the Killingsworth debt, has not been passed on by the Master, and it is against the usage of this Court to act upon matters of account *originally*. The subject matter of this exception is, therefore, re-committed to the Master.

The 9th exception of the defendant is overruled. It appears, that on the 9th of June 1830, Maurice Smith made a large payment to Samuel Smith, in cash, and, at the same time, bound himself by bond to make a further payment of $2000; that this bond was not taken up until some time afterwards, when it amounted, with interest, to the sum of $2165. The Master having credited the whole account of M. Smith with cash, and the principal of the bond as a payment of the 9th of June 1830, it is clear that the defendant is not entitled to credit for the interest which Maurice Smith paid for the use of the $2000.

The matter contained in the 11th of defendant's exceptions is not properly brought before the Court, by way of exception. If material, the proper time to urge it will be, when a decree is prayed for by the plaintiffs. In the mean time, [352] as the matter will be necessarily before the Master, upon the re-commitment of his report, any of the parties, who deem the inquiry suggested a proper and necessary one, may direct the attention of the Master thereto; and have a more specific report concerning the matter thereof.

Our attention was called, during the argument, to the sum of $483 74, mentioned in the order of September term 1833, to

have been retained out of the moneys paid into office, subject to the further order of the Court. The counsel for the legatees has prayed of us that this money may be decreed to be paid unto them. This prayer is not granted. The money is stated to be the one-third of the rents, which had been received by Maurice Smith, of Tennessee lands, whereunto the wife of the late William Smith was entitled to dower; and if so, as an accessory, it ought, in equity, to follow its principal. The money, upon this representation, belongs to the representatives of Mrs. Pugh, and they are not before us.

The decretal order will be drawn in conformity to the principles laid down, and the matters declared, in this opinion.

PER CURIAM. Order accordingly.

NOTE.—On the subject of charging executors with interest, see note upon that question to the case of *Graham* v. *Davidson*, ante 155, and the cases therein referred to.

The act of 1762 relative to the appointment of guardians by deed or will (1 Rev. Stat. ch. 54, sec. 1,) is to be found in the Revised Code, ch. 54 sec. 1. The power is confined to a father appointing a guardian to his own children, and does not extend to the appointment of a guardian by a grandfather to his grandchildren to whom he has devised estate. *Williamson* v. *Jordan*, Busb. Eq. Rep. 46.

On the subject of the allowance of commissions to executors and administrators, see the case of *Graham* v. *Davidson*, ante 155, and the cases referred to in the note on that question.

As to the right of one tenant in common to charge his co-tenant with his share of the expenses incurred in relation to the common estate, see the case of *Davis* v. *Burnett*, 4 Jones' Rep. 71, where a joint owner of corn who had to pay for a breach of a warranty of soundness made upon the sale of it, was held to be entitled to recover a just proportion from his co-tenant.

EQUITY CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NORTH CAROLINA.

DECEMBER TERM, 1839.

CLABORNE WATSON *v.* EDMUND W. OGBURN.

In a bequest of slaves by a testator to his married daughter, "to her and the heirs of her body, if any; if not, an equal division to be made between her husband and herself at her death, her part to return to the old stock," the limitation over of the wife's share is not too remote, but will take effect upon her dying without leaving children.

An agreement between one entitled absolutely to one-half of certain chargeable slaves, a woman and children, and for life as to the other half, and the remainder-man, that upon the latter's assenting to the sale of the slaves by the former, he should have one-half of the purchase money, is not inequitable, and will not be set aside.

To a bill against an agent, his principals are necessary parties.

The plaintiff's bill was filed in February 1838, and it charged that William Ogburn died in 1824, having first duly made his last will and testament, wherein, among other devises and bequests, he bequeathed as follows, viz: "I give and bequeath to my daughter, Nancy Watson, a negro woman named Fan, and her increase after this date, to her and the heirs of her body, if any; if not, an equal division to be made between Claborne and Nancy, at her death, her part to return to the old stock;" that the plaintiff was the "Claborne" intended and designated by the testator in said clause, and that "Nancy," therein mentioned, was Nancy Watson, who for many years before had been, and then was, the wife of the said plaintiff; that the exe-

[354] cutors named in the will of the testator, proved the same after his death, assented to the foregoing bequest, and delivered the slave Fan unto the plaintiff. The bill further stated, that the said negro woman afterwards had six children, one of whom died; that the negro woman and children yielded no profits, but were expensive to maintain; and that the negro woman was disobedient and dishonest; and that for these reasons, the plaintiff, in the month of April 1836, when slaves were at their maximum price, sold the said Fan and her five children to one Rudolphus Dodd, for the sum of $2000, which he charged to have been a very full, if not extravagant, price. The bill then charged that the defendant, Edmund W. Ogburn, claiming to be the agent of the children of the testator, other than the plaintiff's wife, demanded of the plaintiff the one-half of the said price; and threatened, in case of refusal, to bring suit against him therefor, or for the half of the slaves which his constituents claimed by reason of the said bequest; that at the time of this demand, payment of the purchase money had not been made by the said Dodd; that the plaintiff refused to comply with the demand, because he conceived it unreasonable; but, being an old man, and desirous of peace, consented at last that one-half of the purchase money might be deposited with the said defendant, to be held for his constituents until they could be seen by him, and a settlement attempted; and thereupon the said Dodd paid the plaintiff $1000, the half of which was immediately handed over to the defendant, and executed two notes of $500 each, one payable to the plaintiff, and the other to "the heirs of William Ogburn, deceased," the last of which was also delivered to the said defendant; and averred that the money so handed over, and the bond so delivered, to the defendant, were so paid and delivered solely to quiet the apprehensions of those in whose behalf the defendant acted, until an interview could be had between them and the plaintiff, and a better understanding had in relation to the matter in difference between them; but not with an intention to part with his right to the price of the slaves, or any part thereof, under the will of the testator. The plaintiff then insisted, 1st, that under the bequest aforesaid, he had an absolute interest
[355] in the whole of the said slaves; or 2ndly, that at all

events he was entitled to an absolute interest in one-half thereof, and to the use of the whole during the life of his wife; and, therefore, ought to have the interest of the whole purchase money in lieu of those profits while she lived; and charged that, even if he had surrendered the money and delivered the bond to the defendant absolutely for the benefit of his constituents, yet so far as the same was without consideration, he was entitled to relief in equity. The plaintiff charged that he had repeatedly applied to the said defendant in vain, to procure a meeting of his pretended constituents, and had warned him not to deliver over the money or the bond received from Dodd, to them, and that he understood that they were both yet in the hands of the defendant; he set forth the names of the next of kin or legatees of William Ogburn, for whom the defendant had claimed to act, whom he prayed might be made parties to the bill, with apt words to charge them, (if the Court should deem the same necessary,) but prayed process only against the defendant; and prayed that he might answer the charges of the bill; that he might be decreed to surrender to the plaintiff the money and bond so received as aforesaid, in order that the bond might be collected, and the whole enjoyed by the plaintiff, as was most manifestly his right; and for general relief.

The defendant admitted, by his answer, the bequest set forth in the bill, and the assent thereto by the executor, and said that the persons interested in the negroes, in the event of the plaintiff's wife dying childless, having heard that the plaintiff was about to sell the said negroes to a trader, who would carry them out of the State, employed the defendant as their agent, to have the necessary legal measures taken to prevent the execution of this design; and that, in pursuance of the authority with which he was thus clothed, he informed the plaintiff of his determination to prevent this injury to the rights of his constituents. He said further, that it was then reduced to a moral certainty that the plaintiff's wife, because of her advanced age, would never have children; and that it had been a matter of discussion between the plaintiff and the children of William Ogburn, (other than the plaintiff's wife,) whether, in the event of her dying without a child, the [356] plaintiff would be entitled to the whole, or to a moiety

only of the said negroes. The defendant further answered, that upon notifying the plaintiff of his purpose, as above stated, the plaintiff expressed great solicitude to obtain the defendant's permission to carry the purposed sale into execution; which was absolutely refused upon any other terms than an equal division of the purchase money between the plaintiff and the defendant's constituents; averred that to these terms the plaintiff acceded, and thereupon the sale took place, at the price of $2000, half cash and half on credit; and $500 was paid directly by the purchaser to the defendant, and a note of $500, made payable "to the heirs of William Ogburn, other than Nancy Watson," executed and delivered to him by the purchaser. The defendant expressly denied that the money or note was received by him as a deposit, or upon any other terms than in payment for the interest of his constituents in the property sold; admitted that the plaintiff afterwards forbade him from paying over the money or delivering the bond to his principals, and that the same were still in his hands. To this answer there was a general replication; and testimony was taken on both sides, but it is so unimportant that it is unnecessary to state it. There was no proof on the part of the plaintiff that the money received and bond delivered to the defendant, was received or delivered upon *any condition.*

W. A. Graham, for the plaintiff.

J. T. Morehead, for the defendant.

Gaston, Judge, after stating the case as above, proceeded as follows: The plaintiff claims relief, in the first place, for that the money and bond in the hands of the defendant are in conscience *his;* because, according to the legal operation of the bequest in William Ogburn's will, the absolute interest in the slave Fan and her increase, vested wholly in the plaintiff, and the ultimate disposition attempted thereof in the will was void. This position is unfounded. The division, in case Nancy Watson shall not have heirs of her body, is directed to take place *at her death*, and therefore the limitation over is not too
[357] remote. In the next place he insists, that being entitled under the will to the use of these negroes during

the life of his wife, he is therefore, in conscience, entitled to the use of the money, the price thereof. We do not feel the force of this argument. According to the plaintiff's own shewing, the use of the negroes during the life of his wife was a *charge* upon him, and not a benefit—and a charge for the benefit of all interested in the ulterior disposition. The plaintiff had no right to change the character of the property, without the assent of those whom the defendant represented; and there was clearly nothing inequitable in their refusing that assent, unless a half of the purchase money was *forthwith* paid or secured to them. And as it appears that when the sale was made this was actually done and there is no evidence to shew any agreement in relation to the sale, other than such as may be inferred from the division of the purchase money, we must presume that the parties interested deliberately agreed upon this mode of adjusting their respective rights.

The authority of the defendant to act for the children of William Ogburn is not distinctly admitted in the bill; but if the plaintiff had meant to deny his authority, and to set aside the transaction because of the want of authority, the bill ought to have contained a distinct averment of the fact. Instead of this, the bill seems predicated upon the assumption that the defendant was not merely an agent, but the trustee of those for whom he acted. *This* assumption is unfounded; and we should hold it necessary before the plaintiff could have a decree, that the defendant's principals should be made parties to the cause. But as we are satisfied that whether they be or be not made parties, the plaintiff has no equity whereon to demand our aid, we direct his bill to be dismissed with costs.

Per Curiam. Bill dismissed.

NOTE.—The will in this case was made prior to the year 1828. By an act passed in 1827 it was declared, as to all wills and deeds made and executed after the 15th day of January 1828, that "every contingent limitation in any deed or will made to depend upon the dying of any person without heir or heirs of the body, or without issue or issue of the body, or without children, or offspring, or descendant or other relative, shall be held and interpreted a limitation to take effect when such person shall die, not having such heir, or issue, or child, or offspring, or descendant, or other relative, (as the case may be,) living at the time of his death, or born to him within ten lunar months thereafter, unless the intention of such limitation be otherwise, and expressly and plainly, declared in

the face of the deed or will creating it." See 1 Rev. Stat., ch. 43, sec. 3; Revised Code, ch. 43, sec. 3. For a construction of this act, see *Sanderlin* v. *Deford*, 2 Jones' Rep. 74.

As to relieving against a contract, the court of equity will not interfere unless the plaintiff can show that it was obtained from him by mistake, imposition, misrepresentation, fraud or surprise. *Gunter* v. *Thomas*, 1 Ired. Eq. Rep. 199; *Green* v. *Thompson*, 2 Ired. Eq. Rep. 365; *Devereux* v. *Burgwyn*, 5 Ired. Eq. Rep. 351; *Taylor* v. *Taylor*, 6 Ired. Eq. 26; *Amis* v. *Satterfield*, 5 Ired. Eq. Rep. 173; *Deaton* v. *Munroe*, 4 Jones' Eq. Rep. 39.

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[358] JOSEPH MUNNERLIN *v.* CHARLES BIRMINGHAM.

Where one took an absolute bill of sale for a slave for whom he paid a full price, and at the same time gave to the seller, on a separate paper, an instrument, promising that if the latter would, on some day in the ensuing month, "tender" to him the same price, he would "give" him the same slave; adding, "if failing to comply on that day, this shall no longer stand good against me;" and it did not appear that there was any mention then made of a mortgage, or that a loan was ever talked of, or contemplated between the parties, or that the vendor set up any claim to the slave, either as mortgagor, or in any other way, until ten years afterwards; *it was held* that the transaction was never regarded by the parties as a mortgage, but only as an agreement for a re-sale, of which the vendor had lost the benefit, by not complying with its terms.

The plaintiff stated in his bill, which was filed in the Spring of 1835, that on the 12th of December 1822, he borrowed of the defendant the sum of $400; and to secure the repayment thereof, executed a bill of sale, of the same date, for a female slave, named Tener: and, at the same time, took from the defendant, on a separate paper, the following instrument, in writing: "on condition, at January 1823, that Mr. Joseph Munnerlin does come forward, and tender unto me, Charles Birmingham, $400, lawful money of the State, I will give him a negro girl, by the name of Tener, seventeen years old. If failing to comply on that day, this shall no longer stand good against me. December 12th 1822. Charles Birmingham." The plaintiff insisted that the bill of sale, and the above mentioned written instrument, constituted a mortgage of the slave Tener, to secure the sum borrowed; and he thereupon prayed to be permitted to redeem the slave Tener, and her three children.

The defendant, in his answer, denied that he executed the

instrument of writing set forth in the bill. He said that he purchased Tener for $400, that being a full and fair price, and took a bill of sale for her. He denied that there was a mortgage, or any intention to take the slave on mortgage to secure the repayment of the $400.

The plaintiff filed a replication to the answer, and the parties proceeded to take proofs.

Winston, for the plaintiff. [359]

Mendenhall, for the defendant.

Daniel, Judge, after stating the case as above, proceeded as follows: The proof is satisfactory to us, that the defendant did execute the instrument of writing mentioned in the bill. But taking the bill of sale and the said instrument together, and all the circumstances which surround the case, and we are of the opinion that they do not constitute a mortgage. It seems to us, that the instrument executed by the defendant, is but an agreement for a resale of the slave Tener for the sum of $400, if the plaintiff tendered that sum by the month of January 1823. There is nothing mentioned of a mortgage or money borrowed, in either the bill of sale or the paper writing. There is no proof that the girl was worth more than the money advanced by the defendant. There is no covenant in the instruments, or out of them, for the repayment of the money to the defendant, in case of the death of the slave, or any repayment; and there is no evidence that a loan was ever talked of or contemplated between the parties. The slave was immediately delivered to the defendant on the advancement of the money. And it was a long time (upwards of twelve years,) which had elapsed without any mention by the plaintiff, until about two years before he filed his bill, that he had any claim to the slave, as mortgagor, or in any other way. We are induced to think, from the whole case, that the plaintiff never considered the transaction a mortgage, but only as an agreement for a resale which he had lost the benefit of, by not complying with the terms of it in time. *Vide Poindexter* v. *McCannon & Hauser*, 1 Dev. Eq. Rep. 373.

We are of the opinion that the bill must be dismissed.

Per Curiam. Bill dismissed.

NOTE.—See *Chambers* v. *Hise*, ante 305, and *King* v. *Kinsey*, 1 Ired. Eq. Rep. 187.

[360] HUBBARD PEARSON et Uxor et al. *v.* DUDLEY D. DANIEL et al.

Information given to one about to purchase a tract of land, that a particular family has a claim to it, affects him with notice of the equitable claim of the wife to have the land settled to her separate use.

Proof that a husband represented that certain money which he advanced for the purchase of a tract of land, was part of the separate estate of his wife, is competent to establish the fact that it was the wife's money, against one claiming as a purchaser at an execution sale against a third person—*Aliter* if the claim had been under an execution sale against the husband.

A purchase at an execution sale, against one who held in trust for the separate use of a married woman, *held*, upon the testimony of one witness only, supported by corroborating circumstances, against the positive denial of the defendant, to have been made with notice of the equitable claim of the wife, and upon an agreement to convey it to her use, upon being paid the amount of the debt due him for which the land was sold.

A husband cannot, in any way in which a bill may be framed, be a witness for his wife, in respect of property settled to her separate use; for the rule of equity as well as of law, forbids husband and wife to be witnesses for or against each other.

On the 25th of May 1806, in contemplation of a marriage about to take place between Hubbard Pearson, of this State, and Martha Rogers, of South Carolina, several negro slaves, the property of the said Martha, were duly conveyed unto John Rogers and Nathaniel Pearson, their executors, administrators and assigns, upon trust, to the use of the said Martha until the intended marriage should be solemnized; and after the said marriage should be solemnized, then for the sole and separate use of the said Martha for life, free from the control or dominion of her husband, with a power to said Martha, notwithstanding her coverture, to dispose of the same by her last will and testament, or writing in nature thereof; and after the death of the said Martha, in case she should not exercise the said power of disposition, then for the use, benefit and behoof of such child or children, issue of the said marriage, as should be living at her death, to his, her or their heirs forever. The contemplated marriage was soon after solemnized; John Rogers,

one of the trustees in the marriage settlement, died in South Carolina, and Francis S. Lee, of that State, administered there on his estate. Nathaniel Pearson, the surviving trustee, removed from this State to the State of Mississippi. In September 1832, upon the petition of the plaintiff, Martha Pearson, formerly Martha Rogers, and of the said Francis S. Lee, in the Court of Equity for the county of Anson, that [361] Court appointed Benjamin F. Pearson and Clinton Pearson trustees for the purposes of said settlement, in lieu of the said Nathaniel Pearson and Francis S. Lee. At the September term 1835, this bill was filed by the said Hubbard Pearson and Martha his wife, Benjamin F. Pearson and Clinton Pearson and others, the children of the said Hubbard and Martha, against Dudley D. Daniel, Angus McRae and Henry Buchanan. The bill charged, in substance, that after the execution of the said settlement, and the marriage of the said Hubbard and Martha, the trustees permitted him to receive the profits of the trust property, for the purpose of applying them according to the trust declared in the settlement, until the sum of $2000 arising therefrom had accumulated, when John Rogers, one of the trustees, having died, the said Hubbard, at the request of the said Martha, purchased from Nathaniel Pearson, the surviving trustee, a tract of land, with the said sum of money, for the purpose of having the same settled to the same trusts as were declared in that settlement; and that thereupon, and with the intent of carrying this purpose into execution, on the 24th day of January 1826, the said Nathaniel and one William Johnson and Hugh McKenzie, who had some lien or encumbrance on the said tract, joined in a deed whereby the said Nathaniel bargained and sold, and the said William and Hugh confirmed, unto a certain John M. Rogers, the son and administrator of the deceased trustee, in fee simple, the tract aforesaid, with the buts and boundaries set forth in the bill; and that the said sum of $2000 was thereupon paid unto the said Nathaniel, William and Hugh; and averred that it was the intention of all the parties to said deed, as well as of the said Hubbard and Martha, that the conveyance aforesaid should be upon the same trusts as were declared in the settlement; but that the person who drafted the deed, by mistake, omitted to

insert the proper clauses for expressing said trusts; which omission was then overlooked by the persons interested in the transaction. The bill further charged, that in the year 1828, the defendant Daniel recovered a judgment at law against the said John M. Rogers, for the sum of $456 11½, sued out ex-
[362] ecution thereon, and caused the same to be levied on the said tract of land, bought the same at the sale, under the execution, for the sum of $389 53; and having obtained a deed therefor from the sheriff, conveyed the same to the defendant McRae, who afterwards conveyed it to the defendant Buchanan; that before the said Daniel so purchased, he well knew that the said land had been conveyed to the said John M. Rogers, as a trustee for the trusts in the marriage settlement expressed; and that the said McRae and Buchanan had also full knowledge thereof respectively, before they severally contracted for or paid the purchase money for said land. The bill then especially charged, that one William Chapman attended the sale by the sheriff, for the purpose of satisfying the execution against Rogers, and thereby preventing the sale, having been requested so to do by the said Hubbard, who preferred to pay the amount of the judgment, rather than permit his wife and children to be harassed by a law-suit; that before the sale was made, the said Chapman informed the defendant Daniel of his purpose, and proffered to pay the amount of the judgment; but Daniel declined receiving it, stating that it was not material in what way the business was managed; that his object solely was to secure the debt, and preferred purchasing the land at sheriff's sale, declaring at the same time, that whenever the debt due to him should be paid, he would then convey the land to the persons entitled to it; that this declaration and undertaking was made in the presence of the said Chapman, of the said Hubbard, and many others; and they all reposing full confidence therein, permitted the sale to proceed; and the tract of land, well worth $2000, was bid off by Daniel, at the price of $389 53. The plaintiffs charged that they had paid to Daniel the residue of his debt, and had repeatedly offered to refund to him the amount of his bid; but that he had refused to receive the same. And they prayed that the said defendants might be decreed to convey the land to the trustees

for the plaintiff Martha, upon the trusts declared in the marriage settlement, and to account for the rents received from the said land, and damages thereunto done, since they had taken possession thereof.

The defendant McRae did not answer the bill, and the [363] same was duly taken *pro confesso* and ordered to be heard *ex parte* against him. The defendant Buchanan answered merely, that in April 1834, he purchased from the defendant McRae three tracts of land adjoining each other, of which the tract described in the bill was one, at and for the price of $4250, which he averred to be a full and fair price, and that he paid the whole of the purchase money before the filing of the bill; that while in treaty with McRae, having heard a rumor that there was some dispute as to the title of some part of the land, he inquired of *nearly* all the neighbors respecting the title; all of whom informed him that there was no difficulty as to McRae's title, except one William Johnson, who told him that there had been a talk that Hubbard Pearson intended to file a bill about the land; that in consequence of this information, he applied to the Clerk and Master of the Court of Equity, who stated that no such bill was filed, nor had he heard of any person purposing to file one; that thereupon he confirmed his bargain with McRae, and heard no more of the dispute until he had paid the purchase money and obtained the possession of said land. This defendant also said that the plaintiffs resided within a mile or two of this tract of land, while he was in negotiation for it; and, as he believed, had knowledge thereof while it was going on; but they did not set up or pretend a claim to said land, or give him notice thereof, although they had abundant opportunities for doing so. The answer of the defendant Daniel stated that at the January term 1828, he obtained a judgment against John M. Rogers for $423 09, principal money, and $21 85 interest, besides costs of suit; and that execution having been sued out upon that judgment, and levied on the tract of land described in the bill of the complainants, as the land of said Rogers, the said tract was sold in April 1828, when he became the purchaser, at the price of $425; which price, after paying sheriff's commissions and costs, paid off $389 53 of the debt recovered; that the defendant took a

deed of conveyance from the sheriff, and afterwards obtained the possession; that after having had possession for some years, he sold the land to the defendant McRae for
[364] $1625, payable in four annual instalments; that the said defendant then took possession, and early in 1835 sold and conveyed the same to the other defendant, Buchanan, in whose possession it then was. This defendant positively denied that William Chapman, in the bill named, or any one else, offered before the sale to satisfy said execution, or that the defendant used any means to prevent said Chapman or any other person from discharging it, or that he ever told Chapman that he only wished to secure his debt, and that he would re-convey to Hubbard Pearson, or any one else, on payment of his execution and costs—but averred the facts to be, that some time previous to the sale, he received a letter from Chapman, who lived at Cheraw, in South Carolina, requesting the defendant to have the sale postponed until the Tuesday or Wednesday of the court week; and stated that Chapman would attend on that day and satisfy the execution; that the sale was postponed, as requested; that Chapman attended at the appointed day, but declined to have any thing to do in the matter, and refused to satisfy the execution, and thereupon the sale proceeded. The defendant further stated, that after the sale was over, and on the same day, Chapman applied to the defendant and proffered to pay him the amount of his execution, if defendant would convey the land to him; which offer defendant refused; that afterwards, on the same day, Hubbard Pearson applied to him, and desired to know if the defendant would not let him have the land, in case he would pay the defendant the amount of the judgment and costs; which proposition was also refused. But defendant admitted, "that inasmuch as the said Hubbard Pearson was principal in the note on which said judgment was obtained, and the uncle-in-law to the defendant in the execution," that he did agree, on the same day, after the sale had been made, with the said Hubbard, that if he, the said Hubbard, would pay this defendant $700 on a specified day, then this defendant would re-convey the land to such of the children of said Hubbard as the said Hubbard might direct; and said that Hubbard Pearson failed to pay at the appointed day; and

defendant, at his urgent solicitations, and the solicitations of his wife, gave him time repeatedly to make the proposed payment, and after the time last appointed ex- [365] pired, defendant took possession of the premises; which possession had been continued, as he believed, for seven years adversely, and he claimed the benefit of such possession as if he had specially pleaded it. The defendant also stated that he never heard it suggested, until he saw the allegation in this bill, that the land in question was the property of the plaintiff Martha, nor did he believe that it was bought with her separate money; and averred that he was informed before the sheriff's sale, by Hugh McKenzie, one of the persons who executed the deed to John M. Rogers, that Rogers's title was unquestionably good; that Hubbard Pearson was present at the sale, and no claim inconsistent with the title of Rogers was then set up by him or any other person thereto; that since defendant had taken possession of the land, he rented the same to Hubbard Pearson, and took his obligation for the rent, in which the said Hubbard acknowledged the land once to have been that of John M. Rogers; that plaintiffs have repeatedly offered to buy the land from him, and never pretended to question his title to it. Defendant further said that he never heard of the omission alleged to have been made by mistake in the deed to Rogers; and alleged, if the land was paid for, and the omission made by mistake, as charged by plaintiff, both of which he denied, that he was a purchaser for valuable consideration and without notice. The plaintiffs entered a general replication to these answers, and proofs were taken on both sides.

Winston, for the plaintiffs.

No counsel appeared for the defendants in this Court.

Gaston, Judge, after stating the pleadings as above, proceeded as follows: The material facts in this cause are those which are put in issue by the answer of the defendant Daniel. For, as to the special defence set up by the defendant Buchanan, that he is a purchaser for a valuable consideration, and without notice, *that* may speedily be dismissed. He offers no

proofs that he has paid any thing. In his answer, there is enough to fix him with notice. He admits that he had heard from Mr. Johnson, that there had been a talk of H. [366] Pearson filing a bill for the land; and although the Pearsons lived within a mile or two of the land, he proceeded to buy it without making an inquiry of them, or any of them, in relation to this supposed claim. But Mr. Johnson's testimony states the information communicated to him in much stronger terms than it is expressed in his answer. He informed the defendant that the Pearsons did have a claim to the land, although he believed they were too careless to prosecute it. Having chosen to speculate upon the title, after receiving this information, the defendant must abide the result.

The question raised upon the pleadings, from whom moved the consideration for the land conveyed by Nathaniel Pearson to John M. Rogers, might have been one of difficulty, if the defendants had set up title under a purchase at execution sale against H. Pearson. The evidence is full that it passed through his hands, but not so full whether it was *his* money or the money of Mrs. Pearson, although the weight of the evidence is in favor of the latter position. Nathaniel Pearson—with whom H. Pearson, as the agent of his wife, contracted for the purchase, and who was the surviving trustee in the marriage settlement—states his *belief* that the money paid by H. Pearson, to discharge the encumbrances then upon the land, was the separate money of his wife. It is true that he gives no other reason for his belief than H. Pearson's insolvency; but it is not easy to suppose, from the relation in which he stood both to H. Pearson and his wife, but that he must have had the best means of knowing whence the funds came. But the pleadings raise no question between the creditors of H. Pearson and the plaintiff Martha; and as to all others but *his* creditors, the proof that the consideration moved from her is full. It was paid by him as her money, and the conveyance from Nathaniel Pearson, the surviving trustee, to John M. Rogers, the son of the deceased trustee, was made, as Nathaniel Pearson testifies, upon the explicit understanding that the money was hers, and that he was to hold the land as a part and portion of her trust estate, and for no other purpose; and no part of the considera-

tion was paid by John M. Rogers. Besides, it appears that the Pearsons took possession, and held possession of [367] the land so conveyed, until after January 1829; and no claim was ever set up to it by Rogers, in his life-time.

There is no proof of a mistake on the part of the draftsman of the conveyance from Nathaniel Pearson to John M. Rogers, in omitting the declaration of trusts intended to be inserted therein. But Rogers accepted the conveyance of the legal estate, without advancing any part of the consideration money, with a knowledge that the same had been paid as the proceeds of the property secured to Mrs. Pearson, in the marriage settlement; and, therefore, independently of his parol undertaking, became, in construction of law, a trustee for the purposes of that settlement.

The next and most important controversy of fact is, whether the defendant Daniel purchased at the execution sale, upon an agreement that he would convey the land to the purposes of the settlement, upon being paid the amount of his judgment against John M. Rogers. Some light is thrown upon this question, by certain records filed by the defendant as exhibits. From these it appears, that at the July Term 1827, of Anson County Court, two actions were instituted by the defendant Daniel, one against John M. Rogers, by an attachment which was levied on this tract of land, and the other against H. Pearson, by original writ, and that both of these were brought upon a joint and several note of the said Pearson and Rogers, executed 30th January 1827, for the sum of $423 09, payable to the said Daniel, on the 10th day of March then next following. Judgments were obtained in both at the January Term 1828, a *venditioni* issued upon the judgment against Rogers, to sell the tract of land so attached, and a *fi. fa.* upon the judgment against Pearson. Upon the *fi. fa.*, which was endorsed, "this judgment the same as D. D. Daniel *v.* John M. Rogers, and one satisfies both, except costs," the sheriff returned "no goods." The *venditioni*, which was endorsed, "this is the same as No. 38, and one satisfies both, except costs," was returned "land sold and bid off by D. D. Daniel for $425, 15th April, 1838." These exhibits, in connection with the defendant's statement in his answer, shew that the sale at which the de-

[368] fendant bought, was upon a judgment recovered against Rogers, for a debt due from H. Pearson as principal, and Rogers as surety. The testimony of William Chapman is, that he was present at the sale; that it was stated to the defendant Daniel, in his presence, by H. Pearson and H. McKenzie, that the land was held by Rogers in trust for Mrs. Pearson; that Daniel appeared to consider the land as the separate estate of Mrs. Pearson; professed to desire no more than his money from the trustee; did expressly agree with McKenzie and Pearson, in the presence of the witness, that he would bid off the land and convey it to Mrs. Pearson, or to a trustee for her and her children, upon receiving the amount of money due him; that upon this distinct understanding, he was allowed to become the purchaser; that in two hours after the sale, the witness having heard from McKenzie and Pearson, that they had become suspicious, from some things said by the defendant since the sale, that he might not act correctly, offered as the friend of Rogers, the trustee, (who was absent,) to pay him at once the amount of his judgment; but the defendant refused to receive the money, making some evasive answer. If this testimony is credited, the allegation in the bill which we are now examining is fully proved. But it is objected that this is the testimony of one witness only, against the positive and unequivocal denial of the defendant. True, there is but one witness who expressly and directly testifies to the controverted fact, but his testimony is so upheld by corroborating circumstances, and the part of the answer which opposes it is so obviously disingenuous, that we have no difficulty in determining to which we ought to give credit. The Pearson family were in actual possession of the land at the time of sale. Did this circumstance awaken no suspicion in defendant's mind, that they might have some right to the land so held? H. Pearson was notoriously insolvent. Did this fact, connected with the former, lead to no inquiry on the part of the defendant, *his creditor*, whether this land was liable for *his* debt? The answer leads us to infer that he *did inquire* of Hugh McKenzie; for it says that he was told by McKenzie, before the sale, that Rogers's *title* was good. We are not informed *why* he made the inquiry, but can we doubt but

that McKenzie, being privy to the purposes of the con- [369]
veyance from Nathaniel Pearson to John M. Rogers, when informing defendant that the *title* to Rogers was good, informed him also *for whom* Rogers took that title. Besides, what mean the applications which defendant states to have been made to him directly after his purchase, first by Chapman, and then by H. Pearson, to pay him up the amount of his judgment? If there was no understanding before the sale, that its purpose was to *secure* the amount of the judgment, what could induce either to suppose for a moment, that the defendant would take $400 for a piece of land absolutely his, and which he afterwards sold for $1,600? But while he peremptorily rejected all offers for the land from Mr. Chapman, Rogers's friend, he did consent to sell for less than half price, that is to say, for $700, to Mrs. Pearson and her children; and the motive assigned for this act of benevolence is so singular that its *modus operandi* is unintelligible. We may imagine that sympathy for the suffering surety might induce a person of ordinary humanity, on a *re-sale to him* of property bought very cheap at execution, to abate something of its actual value, but how compassion could be excited for the condition of the *principal*, because of a sacrifice of the *surety's property*, certainly is not easy to be conceived. If Mr. McKenzie were alive, it would have been desirable to have his testimony also; but he is dead, and no other person now living is represented as having been privy to the transaction, other than H. Pearson; and he could not be a witness, in whatever manner the bill had been framed. The rule of equity, as well as of law, forbids husband and wife to be witnesses for or against each other. "The foundations of society would be shaken" by permitting it. *Vowles* v. *Young*, 13 Ves. 140. It is, perhaps, proper to notice a document which has been produced by the defendant, and which is relied on as evidence either to shew an abandonment of Mrs. Pearson's equitable right, or to confirm the defendant's denial that she ever had such right in the land in question. This is a note signed by her husband, dated the 23d of June 1828, promising payment to the defendant Daniel, of the sum of $10, on the 1st January 1829, "for and in consideration of the use and rent of a tract of land for part of the [370]

year 1828, *formerly the property of John M. Rogers—now the property of the said D. D. Daniel.*" On this is an indorsement by the *defendant* of some small demands of H. Pearson; and further, that "he is willing they shall balance the note, *if* the maker has no objection." It is very certain that this document neither purports to be, and if it did, could not operate as a release of Mrs. Pearson's equity. And with us it has no weight, as tending to prove that she never had such equity. The deposition of Vincent Parsons, taken by the defendant, shews that from the date of the sheriff's sale, in April 1828, up to February 1829, Mrs. Pearson was, from time to time, striving to make the best terms she could with the defendant, to prevent herself and family from being turned out of possession. It is during this period of moral duress that the signature of her husband is obtained to the paper exhibited, which *obviously was framed and used*, not for the purpose of securing rent, but to serve as an acknowledgment that the land when sold belonged to John M. Rogers, and that it became the property of Daniel under the sale. We view it as a shallow artifice to prop a title, which the defendant was conscious needed support. Upon the proofs, therefore, the Court holds that the defendant, Daniel, did buy the land in question, with notice that it was held by John M. Rogers for the purposes of the trust in the marriage settlement, and upon an agreement to convey it to those trusts, when he should be fully satisfied the amount due him of the debt of H. Pearson and John M. Rogers.

We much desire that the nature of *that debt* were more fully explained, and we think it probable that this might have been done on the part of the defendant, had he deemed it expedient. It seems a little extraordinary that a person represented as so absolutely insolvent as H. Pearson, could find surety for upwards of $400; and also, that the friends of Mrs. Pearson, when this land was put up for sale, seemed all to acquiesce in the propriety of holding *this* debt a proper encumbrance upon it. These circumstances have induced us to apprehend that the debt was in some way connected with the payment made for the land when conveyed to Rogers, and that *he* joined
[371] the husband of Mrs. Pearson in this note, upon the faith that the money to take it up should be raised out of

the proceeds of Mrs. Pearson's separate property. However that may be—in regard to which we make no declaration, as the plaintiffs found their claim to the relief of the Court mainly on the agreement of the defendant to re-convey upon payment of this debt—we permit the land to be regarded as a security for it.

There must be an account taken, as prayed for, of the profits and alleged waste of the land, since it has been possessed by the defendants respectively; and also of what is due to the defendant Daniel, because of his said debt. When the result of these accounts is ascertained, the Court will then decree a conveyance of the land to the purposes of the trust, upon the payment of the balance which may be found due; and such other relief as may then appear necessary.

PER CURIAM. Decree accordingly.

NOTE.—Any information which is sufficient to put the party upon an inquiry will be notice of an equity. *Webber* v. *Taylor*, 2 Jones' Eq. Rep. 9. Notice of an equity after a purchase will not affect the purchaser who subsequently gets in the legal title. *Baggerly* v. *Gaither*, Ibid. 80. A purchaser at a sheriff's sale cannot protect himself against an equity on the ground that he had no notice; for the sheriff can sell, and the purchaser can acquire nothing but the interest in the estate, which the defendant in the execution had as it then existed. *Reed* v. *Kinnaman*, 8 Ired. Eq. Rep. 13.

JAMES MOORE *v.* BOSTON ISLEY. [372]

If there be several sureties for the same principal, and one of them be fixed with the payment of the whole debt, or of more than his rateable part thereof, the others, who are solvent, shall be compelled to contribute, in order to equalize the loss. But if by any agreement between the sureties, one of them is released by the creditor, upon his securing the payment of a certain part of the debt, he shall not afterwards be called upon to contribute to one or more of the remaining sureties, for a loss arising from the deficiency of another of them.

One of three joint solvent sureties cannot sustain a bill against either of his co-sureties for contribution out of a fund alleged to have been received by that surety for his indemnity from the estate of an insolvent co-surety, without making the other a party.

While the relation of joint sureties exists, funds received by one of them, (except under special circumstances,) for the discharge of, or as an indemnity against, his liability, are to be applied for the common benefit of the sureties.

But after that connection has been severed by an agreement among the sureties, each of them has his distinct and several claim to prosecute, because of what he has paid for his principal, or for an insolvent joint surety; and the others have no right to demand participation in what his diligence may enable him to procure, while thus prosecuting his several claim.

In the year 1817, the plaintiff and the defendant, together with Daniel Harvey and William Dickey, became jointly and severally the sureties of one James B. Dickey, for the faithful discharge of his duties as guardian to the infant children of Henry Shutt, deceased; and, as such sureties, executed with their principal, the ordinary bonds required by law to be given by guardians. The said James mismanaged and neglected the estates of his wards, was removed from his guardianship, became insolvent, and left the State. In the year 1824, suits were instituted upon these bonds against all the sureties and judgments rendered for upwards of $6,900. At the time of rendering these judgments, William Dickey was believed to be utterly insolvent; the defendant was regarded as in doubtful circumstances, and the plaintiff and David Harvey had reason to fear that they would be compelled to pay the larger part of these judgments. The now guardian to the minors was disposed to show every lenity to the sureties which was consistent [373] with his duty, and readily assented to a proposition which was suggested by the plaintiff, with the assent of Harvey. It was proposed that he should endeavor to procure from the defendant, satisfactory security for the payment of one third of the judgments; and he was authorised, if he could effect such an arrangement, to release and discharge the defendant from any further liability upon the judgments; and the plaintiff and Harvey undertook and engaged, that they would then severally secure the payment of a third each. The guardian entered into a negotiation accordingly with the defendant, succeeded in making with him a satisfactory arrangement for securing the payment of the one third of the amount recovered, and, thereupon, on the 17th June 1824, with the approbation of the plaintiff and Harvey, executed unto the defendant an instrument under seal, whereby, after reciting the judgments aforesaid, the payment of the one third thereof by the defendant, the assent of the plaintiff and Harvey, that in consequence

thereof the defendant might be wholly discharged from the said judgments, without their or either of them being *released* or exonerated from the two-third parts remaining unpaid, he covenanted with the defendant that neither he nor his said wards would further sue, arrest, prosecute or take the defendant, his land, tenements, goods or chattels, by virtue of the said judgments. Harvey and the plaintiff did not either of them make the arrangements which had been agreed upon, for securing the payment of the unsatisfied parts of these judgments; and the collection of them having been lately compelled, Harvey's property was found insufficient to satisfy his portion; and the plaintiff was obliged to pay this deficiency. He then brought this bill against the defendant, and prayed that the defendant might be decreed to divide with him the loss which he had sustained by reason of Harvey's insolvency.

W. A. Graham, for the plaintiff.

Waddill, for the defendant.

Gaston, Judge, after stating the case as above, proceeded as follows: Courts of Equity interfere between co-sureties upon a principle of natural justice. If several persons have become bound as sureties for the same principal, whether [374] these obligations be testified by one and the same instrument, or by different instruments, and whether the fact of such common engagement be or be not known to the respective sureties, if, by the default of the principal, a loss must be sustained by some of the sureties, it is the obvious dictate of justice that it should be divided equally among all. The interest, if any, was common—so should be the burthen; the hazard was common—and so should be the misfortune. But it may be, and it generally is, in the power of the creditor to command the payment of the entire debt from which of the sureties he pleases. His caprice shall not be permitted to destroy their natural equities as against each other, and if one of them be fixed with the payment of the whole debt, or of more than his ratable part thereof, the others who are solvent shall be compelled to contribute, in order to equalize the loss. Equality is here equity. The suffering surety is subrogated to the rights

of the creditor, as against the other sureties, to the extent of their shares of the debt. The judicial recognition of this principle as a rule of right, may be the foundation of inferring a contract between co-sureties that the loss shall be thus apportioned. But, whether the liability to contribution rest directly upon this principle of natural equity, or upon the contract inferred from the presumed knowledge of the principle, it cannot be questioned but that such arrangements may be made between the co-sureties as will take them out of the operation of the principle, and negative the implied contract. Here the defendant was originally bound with the plaintiff and Harvey, in a common liability for the same principal; and there being no contract to the contrary, he was bound to share equally with each of them in the loss occasioned by the default of their principal. But it was subsequently agreed between the parties to this common liability, that it should be severed, and that each should secure to the creditor the payment of a third of the joint debt, and receive from him a release as to the residue. This agreement was executed on the part of the defendant, and he, with the assent of the others, obtained from the creditor a covenant, operating as an absolute release to him. The other two thirds of the amount recovered then remained an *onus* upon the plaintiff and Harvey only. They had been be-
[375] fore co-sureties with the defendant for the whole amount, but after this release to the defendant they were alone co-sureties for the part remaining unpaid. The defendant, by their consent, was thus taken out of the reach of the principle which rendered him liable to contribution for an injury which either of them might sustain, by reason of the inability or default of the other. It seems to us, that an express agreement that the defendant should not be liable to such contribution was not necessary. His original liability to the other sureties was founded on the tie of a common responsibility. This *vinculum* being severed by the consent of the parties—a common responsibility no longer continuing as to him, but a new responsibility, to a diminished amount, being created between the others—the plaintiff has no ground of natural equity or of implied contract, on which he can demand of the defendant to share with him the loss sustained by reason of this latter re-

sponsibility. The creditor has no right or remedy against the defendant to which the plaintiff can claim to be subrogated. All the creditor's rights and remedies against the defendant have been extinguished by the assent of the plaintiff. The inducement to the defendant to exert himself to discharge a third of the debt was, to save himself from the hazard of being compelled to pay more. This object would be in a great degree defeated, if, after his release by the creditor, he might be obliged to pay more, in case either of the others should neglect to perform what was incumbent upon him. Had the plaintiff and Harvey executed the agreement on their parts, the present controversy could not have arisen. Each of them relied upon the other for the performance of this agreement; and if this confidence has been misplaced, he who trusted must bear the consequences. It is the opinion of the Court that the bill, so far as it seeks contribution from the defendant, because of the loss thrown upon the plaintiff by Harvey's failure to pay a third of the judgments, must be dismissed. The bill has other objects. It charges that the defendant, since the departure of James B. Dickey from the State, has obtained property from or of the said James, which he hath converted to his exclusive indemnity; and prays that the defendant may be decreed to give the plaintiff an equal benefit of this in- [376] demnity. The defendant denies this allegation peremptorily and fully, and no evidence is offered to support it. The bill, therefore, must be dismissed also, so far as it seeks to charge the defendant because of property of the said James, alleged to have been thus received.

The bill further charges that the defendant has received property of William Dickey, the supposed insolvent surety, and appropriated it to his exclusive indemnity, and prays the benefit of a participation in this. The defendant admits, that as the administrator of William Dickey, who it thus appears is dead, he has received certain notes; and that he has otherwise got into his possession bonds, in which the said William had an equitable interest; but insists that he has paid over to the plaintiff more than an equal share of these notes and bonds. The defendant also admits that he is prosecuting a claim against the heirs at law of William Dickey, with the view of

subjecting a tract of land to sale, in order to remunerate the defendant for the excess he paid over a fourth of the judgments against James B. Dickey and his sureties. The Court forbears from considering the equity arising upon this part of the case, because it is of opinion that the same cannot be definitely decided, without making Daniel Harvey a party in the cause. Should the fund which the plaintiff seeks to charge, be one which the defendant is bound to apply to the indemnity of the plaintiff, it is also applicable to the relief of Harvey, so far as he may have been injured. The objection is not taken by the pleadings. The Court does not dismiss the bill on this account, but will retain it for a reasonable time, in order that the plaintiff may, if he thinks proper, take the proper steps to make Harvey a party to the suit. If the plaintiff does not move within the first twenty days of the next term, the bill is to be dismissed altogether, with costs.

PER CURIAM. Decree accordingly.

The plaintiff having, under the leave given him in the decree made in this cause, in accordance with the foregoing opinion which was filed at a former term, taken the [377] necessary steps to make Daniel Harvey a party, the cause came on to be further heard at the present term, when the following opinion of the Court was delivered by his Honor:

GASTON, Judge.—When this cause was heretofore heard, every thing was disposed of except the claim set up by the plaintiff to have an account and contribution from the defendant, because of property of William Dickey, the supposed insolvent, and the defendant's intestate, which was alleged to have come to the hands of the defendant. Upon this part of the case we then forbore to decide, because we deemed it essential that Daniel Harvey should be made a party. The plaintiff hath since amended his bill, and therein stated that the said Daniel Harvey had died, and the plaintiff had duly administered on his estate, and insisting that the defendant was bound in equity to divide all the funds which had or might come into his hands, of the estate of the said William

Dickey, in such manner as to make the loss fall equally upon the solvent sureties, prays for the necessary accounts, and for relief accordingly. The defendant insists by his answer, that the plaintiff hath no right to call upon him for any contribution, because of funds of the said William Dickey, either received or to be received by him, except for any excess thereof, after remunerating the defendant for what he paid because of the said William's supposed insolvency, and states his belief that there will not be any such excess.

The position taken by the defendant is, in our judgment, correct. While the relation of joint sureties exists, funds received by *one* of the joint sureties, (except under special circumstances, not necessary to be now stated,) for the discharge of, or as indemnity against, *his* liability, are to be applied for the common benefit of the sureties. But after that connection has been severed, each of the sureties has his distinct and several claim to prosecute, because of what *he* has paid for his principal, and the others have no right to demand participation in what his diligence may enable him to procure, while thus prosecuting this several claim. So, when one of several sureties neglects to pay his part of the debt of an insolvent principal, and the whole is paid by the other sureties, then as to the sums respectively paid by them to make up *his de-* [378] *ficiency*, he stands to each of them as a principal, and each in like manner has a *several* claim to prosecute against him to this extent.

The defendant administered on the estate of William Dickey, and has a right to avail himself of all the privileges of an administrator, to reimburse himself out of the estate of his intestate for what his intestate owed *him*. The plaintiff's debt is of the same dignity. The demands are distinct, and the defendant, in conscience as in law, may *retain* as against the plaintiff, for the full satisfaction of his own demand.

The plaintiff has a right, if *he chooses*, to have an account of the estate of William Dickey, in the hands of the defendant, the administrator, applicable *as assets* to the satisfaction of the plaintiff after allowing this retainer to the defendant for the full amount of his own loss. It is for him, however, to consider whether he will run the risk of taking such an account.

He may elect to do so at any time within the first twenty days of the next term; if he do not so elect, the bill to stand dismissed, with costs.

PER CURIAM. Decree accordingly.

NOTE.—The principles laid down in this case will be found to be further illustrated and enforced in the subsequent cases of *Gregory* v. *Murrell*, 2 Ired. Eq. Rep. 233; *Bell* v. *Jasper*, Ibid. 597; *Allen* v. *Wood*, 3 Ired. Eq. Rep. 386; *Long* v. *Bernett*, Ibid. 631; *Jones* v. *Blanton*, 6 Ired. Eq. Rep. 115; *Brandon* v. *Medley*, 1 Jones' Eq. Rep. 313; *Barnes* v. *Pearson*, 6 Ired. Eq. Rep. 482; *Leary* v. *Cheshire*, 3 Jones' Eq. Rep. 170.

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[379] JOHN HOUGH *v.* CHARLOTTE D. MARTIN et al.

The construction of devises of legal interests in land is a legal question, and belongs to the tribunals of the law, and not to those of equity; and the obscurity of the will furnishes no sufficient reason for applying to equity; for, if the obscurity be not so great as to render the disposition altogether unintelligible, the devise will be valid at law, so far as it can be understood; and if it be so vague and uncertain as not to amount to a designation of any *corpus*, it necessarily follows that no court can help it, but that it must be ineffectual.

A Court of Equity will not entertain a bill to settle boundaries, except in cases in which the boundaries were once certain, and were rendered uncertain by the default of the defendant, or those under whom he claimed; and where there was either an agreement that the land of the several parties should be distinguished, or some relation between the parties, which made it the duty of one of them to preserve the landmarks, and therefore the boundaries became confused, by the neglect or fraud of the party charged with that duty—as a tenant.

It is essential to a bill to stay waste, that a good, and not a doubtful title to the place wasted, or in which the waste is apprehended, should be shewn. Equity will not interfere for that purpose, where, by possibility, the plaintiff's claim, now confessedly uncertain, may turn out upon evidence hereafter to be discovered, to cover a part of the land in which it is said the waste is contemplated.

In a bill for the discovery and production of deeds it is absolutely necessary to charge that the deeds have come to, or are in, the hands of the defendants. It is not sufficient to state that a certain person had some deeds in his hands, without describing them, and that he died and made some of the defendants his executors, and others his devisees, without any allegation that any deeds for the land claimed by the plaintiff, or material to him in the controversy, have come into the custody, or under the control of the defendants.

The bill was filed in September 1838, and charged that James Hough, a brother of the plaintiff, died some time in the

year 1821, having previously made and published his will, duly executed to pass real estate, wherein he devised as follows:

"I give to James Martin the tract of land of 200 acres I now live on, including other tracts and parts of tracts within the bounds here laid down, beginning at a post oak, Thomas Smith's corner, on the upper side of Cedar Creek, including a tract of 250 acres I bought of James Garris; also, a 50 acre tract I bought of Henry Norman; a 4 acre tract I bought of Thomas Mawdthen, beginning at the corner of the [380] Garris tract and Norman tract, not far from the old field, running a direct course to the upper corner of the Belyen tract, in the old field, a stake; then including the Belyen tract of 100 acres; then beginning at a Turkey oak, William Kirby's corner, on the upper side of Cedar Creek, then crossing said creek, with his line, to a corner, then with the courses of the different tracts to Thomas Smith's land—said Martin's, when it joins them with Thomas Smith's lines to the beginning post oak; as the patterns and deeds will shew, to him forever. I give to Hezekiah Hough, Jr., 200 acres of land, whereon John Ingram now lives, after the time of his lease, being five years from the 1st of January 1821. I give to Moody Hough 100 acres of land, whereon the widow Nicolin now lives. I give to Hezekiah Ross 200 acres of land, including the Brown plantation, beginning at a corner of the Parker tract, next to John Briley's. I give the remaining part of my land, not given away, to John Hough."

The bill then alleged that the description in the said will of the several tracts of land devised to the said James Martin, Moody Hough and Hezekiah Ross, was so obscure that the plaintiff was unable to fix upon the residue, which of right under the will belonged to him; and charged that James Martin, taking advantage of the said difficulty, had taken possession, several years before, of a portion of the land which the plaintiff confidently believed was not devised to the said Martin, nor otherwise disposed of by the said will, and consequently, by the terms thereof, belonged to the plaintiff; that the plaintiff accordingly instituted an action of ejectment against the said Martin, in the Superior Court of Law for Anson county, but failed therein, by reason of his inability to locate his claim

under the said will; and that the said difficulty still continued, and was likely to continue, without the aid of the Court of Equity. The bill then charged that the plaintiff frequently applied to James Martin, who qualified as the sole executor of the testator, to admeasure and lay off to him, his, the plaintiff's, portion of the land, under the devise in his brother's will, and to surrender to him the title deeds therefor, which, the
[381] plaintiff averred, were all in the possession of the said Martin; with all which reasonable requests the said Martin altogether refused and neglected to comply. The bill charged further, that some time in the year 1836, the said James Martin died, leaving a will properly executed to pass real estate, of which he appointed Thomas Waddill and Charlotte D. Martin, his executor and executrix, who duly qualified thereto, and wherein he devised the lands given him by the will of James Hough, to his widow, Charlotte D. Martin, and his children; and that since the death of the said James Martin, his said devisees had taken possession of, and trespassed upon, lands which the plaintiff well believed were his own, under the will of his said brother, James Hough; that the said Moody Hough and Hezekiah Ross, both before and since the death of the said James Martin, had done likewise; and that all the said parties still continued and threatened so to do; and the plaintiff alleged, that should he ultimately be placed by this Court in a situation to assert his rights at law, the said lands would be so cut down, worn out, and otherwise destroyed, as to be of little or no value, unless something was done to arrest the said parties "in their destructive career." That the said Hezekiah Ross had sold his interest to one John Briley, who was also committing depredations upon lands which the plaintiff believed constituted a portion of the lands devised to him by his said brother; and that the plaintiff had frequently applied to the said parties in a friendly way, and requested them to respect his rights, and come to some understanding and agreement, by which the property of each might be fixed and established by proper metes and boundaries; but that these reasonable requests of the plaintiff, the said parties had entirely disregarded, pretending at some times that their claims covered all, or nearly all, the lands owned by the said testator,

James Hough; and at others, that at law the plaintiff's claim was altogether barred; which pretences the plaintiff alleged to be untrue, and that he was entitled to a large quantity of valuable land, under the will of his said brother; but that he could not establish his metes and bounds without the assistance of this Court. The bill then prayed for process against the executors and devisees of the said James Martin, [382] Moody Hough and John Briley, that they should answer all the allegations of the said bill, and particularly "that they might set forth and discover what land they claimed under the said will of the plaintiff's brother; that they might be enjoined from cutting down or otherwise wasting any of the timber, houses or land devised by the will of James Hough, until the land severally devised to each claimant was laid off and ascertained; and that the rights of the plaintiff might be settled and ascertained, and his land admeasured and laid off to him by metes and bounds; and that the title deeds to the said land might be all set forth and produced, and such as the plaintiff was justly entitled to, handed over and delivered to him;" and for general relief.

To this bill the defendants demurred; and the cause coming on to be heard at Anson, on the last circuit, before his honor Judge Toomer, upon the bill and the demurrer thereto, his Honor sustained the demurrer, and the plaintiff appealed.

No counsel appeared for the plaintiff in this Court.

Winston, for the defendants.

Ruffin, Chief Justice.—No counsel has appeared before us for the plaintiff; and we cannot, therefore, be sure that we correctly apprehend the ground or grounds on which relief was intended to be claimed in the bill. As far, however, as we have, unaided, been able to collect the grounds brought forward in the bill and exhibits, we are of opinion that the bill cannot be supported, but was properly dismissed.

From the general scope of the bill, the principal object, as stated particularly in the prayer, seems to be, to have the land devised to the plaintiff admeasured and laid off to him by metes and bounds; and as subsidiary to that relief, that the

land devised to the other devisees respectively be laid off and ascertained, and to those ends, that the defendants may produce the title deeds of the testator's lands; and in the mean while, that the several defendants may be enjoined from cutting timber, or committing any other waste upon any of the lands devised in the will.

[383] It is to be remarked, in the first place, that the Court is not called to act between these parties on the idea of decreeing a partition of lands given or held jointly or in common. There is nothing of that kind in the will or bill. The devises are distinct to each devisee, and of distinct parcels; and, therefore, there is no partition to be made.

But, although the bill admits that the devises are not of shares in a known subject, but are devises of different tracts of land to sundry persons in severalty, yet it states, as the grievance to the plaintiff, that the descriptions in the will of the several tracts given to Martin and the others are so obscure, that he cannot identify those tracts; and, therefore, cannot know what land is given to himself, the plaintiff. The object, then, is to obtain that knowledge by the aid of this Court, as the plaintiff says he has failed in an attempt to identify his land upon the trial of an ejectment.

We are at a loss to conjecture what means a Court of Equity has, of elucidating the point which creates the difficulty to the plaintiff, more than a Court of Law possesses; or of obviating the consequences of that difficulty under which the plaintiff is suffering, as he says. The construction of devises of legal interests in land is a legal question, and belongs to the tribunals of the law, and not to those of equity. The vagueness, or obscurity from any other cause, found in the terms in which the gift is expressed, cannot change the jurisdiction; for this Court has no peculiar principle of construction, in such cases, but interprets the will as a Court of Law would, and both courts use the same means of identifying the thing given, namely: by resorting to documents, the testimony of witnesses, and surveys. The obscurity of the will, therefore, furnishes no sufficient reason for applying to equity; for if the obscurity be not so great as to render the disposition altogether unintelligible, it will be valid at law, as far as it can be understood; and if it sound to

folly, so far as not to amount to a designation of any *corpus*, it necessarily follows that no court can help it, but that it must be ineffectual. For this reason, the bill cannot assume the aspect of one for ascertaining confused boundaries; for although the Court of Equity has exercised the jurisdiction of settling boundaries of legal estates, yet it has been [384] cautiously exercised, and in only a few instances, and in none in which the boundaries were not once certain, and had been rendered uncertain by the default of the defendant, or those under whom he claimed. In the case before us, the gravamen is not that a single landmark had been altered, or been permitted to perish by the act or neglect of the other parties; but that the testator was inexplicit and obscure in the language of his will.

If, however, that objection did not exist, the present case is not within the principles upon which the jurisdiction of ascertaining boundaries has hitherto proceeded. In all the cases, there was either an agreement that the land of the several parties should be distinguished, as in *Norris* v. *Le Nevo*, 3 Atk. 31; or some relation between the parties, which made it the duty of one of them to preserve the landmarks, and therefore the boundaries became confused by the neglect or fraud of the party charged with that duty—as a tenant. *The Duke of Leeds* v. *the Earl of Strafford*, 4 Ves. 180; *Attorney General* v. *Fullerton*, 2 Ves. & Bea. 264; *Willis* v. *Parkinson*, 1 Swanst. 9. It is not enough that the boundary is controverted, or that it has become confused, although it was once plain; but the confusion must have arisen from the misconduct of the defendant, who is therefore equitably obliged to aid in its re-establishment. *Miller* v. *Warmington*, 1 Jac. & Walk. 492. Between independent proprietors, equity does not interpose, where there is no agreement, fraud or neglect, and require either of them, against his will, to have his legal rights determined in any but the established legal method. *Atkins* v. *Hatton*, 2 Anstr. 386; *Speer* v. *Crowter*, 2 Mer. 417.

Nor is it possible to uphold the bill as one for an injunction to stay waste, or for a discovery. As a bill of the former kind, it is radically defective, in not shewing a title to the place wasted, or in which waste is apprehended. The Court could

not, therefore, act at all, without making the injunction as broad as the prayer of the bill on this head, and restraining the defendants from the ordinary acts of ownership in any of the devised lands, as well those given to the defendants as [385] those claimed by the plaintiff, under the residuary disposition to him. The Court must not deprive the defendants of the use of their own property, because, by possibility, the plaintiff's claim, now confessedly uncertain, may turn out, upon evidence hereafter to be discovered, to cover a part of the land in which it is said the waste is contemplated. That would render the preventive justice of the Court, the instrument of positive oppression on the owner of probably the whole, and certainly a part, of the estate in his possession. *Davies* v. *Leo*, 6 Ves. 787. The bill ought to state a good title in the plaintiff to the specific land, else he cannot have an injunction. A doubtful title will not be sufficient. *Jones* v. *Jones*, 3 Meriv. 173; *Storm* v. *Mann*, 4 John. C. C. 21.

As to the discovery of the deeds and their production, it is sufficient, without noticing other things, to say, that the bill does not charge any deeds to have come to the hands of these defendants. It only alleges that James Martin, the executor of the testator Hough, had some deeds in his possession, though no description of them is given, and then that Martin died and made some of the defendants his executors, and devised to other of the defendants the lands given to him by the first testator. But, there is no allegation that any deeds for the land claimed by the plaintiff, or material to him in this controversy, have come into the custody or under the control of the defendants.

PER CURIAM. Decree affirmed.

NOTE.—As to the question of the jurisdiction of a court of equity in construing a will see *Simmons* v. *Hendricks*, 8 Ired. Eq. Rep. 84. Upon the question of confusion of boundaries see *Merriman* v. *Russell*, 2 Jones' Eq. Rep. 470, whereupon the purchase of the easement of a mill race over the defendant's land which was located and marked, but afterwards obliterated by the defendant so that it could not be certainly identified, the court of equity granted relief by ordering a commission to have the site marked out again.

As to the question of injunction when the title is doubtful see *Irwin* v. *Davidson*, 3 Ired. Eq. Rep. 311.

GUILFORD TALLY *v.* MARTHA TALLY.

A Court of Equity will not entertain a bill against a lunatic by his guardian, for a settlement of the latter's accounts, and for payment of what may be found to be due to him from the lunatic; the proper method of proceeding in such case being by petition.

If a person maintain a lunatic for a number of years, without being appointed his guardian, he cannot sustain a suit in equity against the lunatic for the necessaries furnished; his remedy, if he have one at all, being by an action of assumpsit at law.

The bill stated the defendant to be a sister of the plaintiff and an idiot; and that, upon the death of their father, [386] in 1818, she became entitled to three slaves, and to the sum of $500 in the hands of the plaintiff; that he then took her to live with him, for the purpose of taking care of her; and also took the management of her property, as she had no guardian; that he had supported her comfortably up to the filing of the bill, in 1838, and that her negroes had increased to thirteen in number; and that her maintenance and that of her slaves had exhausted the sum of money originally in the plaintiff's hands, and also the profits of the slaves, and that there remained a large balance due to the plaintiff; that in 1836, the plaintiff was appointed the guardian of his sister by the County Court; and that upon the application of the plaintiff to have his accounts settled, that Court appointed auditors for that purpose, and they, in August 1837, made a report, upon which the balance due to the plaintiff was found to be $2,205 19. A copy of the report was annexed to the bill, and therein the plaintiff was credited annually with the maintenance of the defendant and her slaves, and with interest thereon from the end of each year to the date of the report, amounting in the whole to $4,214 28; and charged with the debt of $500 and the hires of the slaves accruing annually, and with interest as on the other side, amounting in the whole to $2,009 09.

The bill then stated it to be material to the plaintiff, to have his accounts settled without delay, as the witnesses by whom he could support his claim might die before a settlement could be made with the next of kin of the sister; and as she was an

idiot, that a settlement could only be made through the intervention of the Court of Equity. And the bill thereupon prayed, that the plaintiff's accounts might be taken under the direction of the Court, and the balance due him ascertained by the decree of the Court, and as many of the slaves be decreed to be sold as would satisfy such balance.

Upon the motion of the plaintiff, the Clerk and Master was appointed to defend the suit, and the plaintiff ordered to pay into his hands a sum to defray the expense. On behalf of the defendant a demurrer, for want of equity, was put in; and on the argument, before his honor Judge SAUNDERS, at
[387] Warren, on the last circuit, the demurrer was overruled, and an appeal on the part of the defendant allowed.

No counsel appeared for the defendant in this Court.

Badger, *W. H. Haywood* and *The Attorney General*, for the plaintiff.

RUFFIN, Chief Justice, after stating the case as above, proceeded as follows: Upon the reading of the bill, it struck us as being liable to the objection of novelty; which is an objection in itself of no inconsiderable force. Our attention was not called to any precedent for it; and none such is within our own remembrance. In further considering the case, the Court has come to the conclusion that the bill can derive as little support from principle as from the practice of the Court.

How far a Court could allow one notoriously of insane mind, like this party, to be charged even for proper maintenance, by even a brother, for so long a course of years, without applying for a commission and getting an order of the Court confirming the custody of the person, and fixing a proper allowance, would at least be the subject of much consideration, if it were now to be determined. But we do not found our judgment on that point; and, therefore, it may be assumed that, like that of an infant, the contract of one *non compos mentis* is not void, when for necessaries or things suitable to the person's fortune and habits of life. Indeed, such appears now to be the doctrine of the Courts of common law, where there is no fraud or undue advantage. *Baxter* v *Earl of*

Portsmouth, 5 Barn. & Cres. 170; *Brown* v. *Jodrell*, 3 Car. & Payne, 30. Now, if it be admitted that the plaintiff's knowledge of his sister's condition makes no difference, and that he is entitled to a part, at least, or to the whole of his demand, as a debt for proper maintenance, yet that is a legal demand, for the recovery of which he has no right to come into this Court. It is simply a case for an action of assumpsit, if the idiot be liable at all; and there is nothing to change the jurisdiction from law to equity, whereby this proceeding, as an adversary one *inter partes*, can be sustained.

If the plaintiff were merely the creditor of his sister, such would be the law. The relation between the par- [388] ties does not affect this question. That the plaintiff is the committee of the other party, rather increases the objection to this mode of proceeding, as it seems to us. The Court of Equity may order a proper allowance to be paid out of the lunatic's estate for future maintenance; and it is not questioned that an order may also, in a proper case, be made for the satisfaction of past maintenance; and, indeed, for the payment of any debt of the lunatic. But that is a jurisdiction arising out of the custody, by necessity, of the sovereign of the person and estate of the lunatic; and the corresponding obligation to maintain the lunatic, and to pay his debts, as far as the estate may be available. If, indeed, a creditor can get a judgment at law, there will seldom be a ground on which the Chancellor can restrain him from proceeding against the person or tangible property of the lunatic. But, if the creditor find it necessary to apply to the Chancellor for payment, he owes his satisfaction partly to the grace of the sovereign, and partly to the duty of the Chancellor to look to the ultimate benefit of the *non compos* and his estate. This last is so much the object, that Lord Eldon said he could not pay a lunatic's debts and leave him destitute, but must reserve a sufficient maintenance for him, although, in consequence, the creditors might put him in jail, and the Court would have to support him there. *Ex parte Hastings*, 14 Ves. 182. But all these applications to the Chancellor are made by petition, and the case does not assume the form of a controversy *inter partes*. Upon the petition, all necessary and proper inquiries are ordered; and in making

them, the Master is usually directed to procure the aid of the presumptive heir, or next of kin, by giving them notice to attend his proceedings; and, upon the report, the order is for the payment of such sum as may appear fair and right upon the whole, and considering the value of the property. So likewise is it in settling, or as it is technically called, passing, the accounts of the committee, which is done upon petition.

That being the tried and settled method, the Court would not like to allow it to be needlessly changed, although we are not very tenacious in matters of form merely, when the [389] result is essentially the same. But, there are substantial differences between applying by petition in the matter of a lunatic, and proceeding by bill praying a decree. In the first place, it is the duty of the Court to have regard to the difference in expense. Then, in an adversary suit, the Court is not left at large in its inquiries to ascertain the real justice of the case, but is trammelled by the pleadings, and confined to the matters therein put in issue, and to the parties on record. In the present case, for example, the statute of limitations, if duly insisted on, might probably bar much of the plaintiff's demand, which is of twenty years standing; yet, in the answer, put in upon the overruling of the demurrer, no notice is taken of it. So that, however averse the Court might be to countenance such laches, and although upon a petition an order might be refused for the payment of the stale parts of the claim, the point would yet be concluded in this suit by the frame of the pleadings. Besides, a decree goes much farther than an order. If the plaintiff were to get a decree at all in a suit, it would bind the person of the lunatic; and upon it, execution might be sued out against her property generally, instead of the party being confined to a particular and appropriate fund, applied thereto by the Court in the order upon petition. Whatever may be the unavoidable operation of the judgment of a Court of Law, certainly a Court of Equity ought not so to act that a person peculiarly under the protection of that Court, as a lunatic is, may be imprisoned for his maintenance as fixed by the Court.

It is observable, also, that the Legislature takes the same view, in the acts on this subject. It is contemplated in the

acts of 1801 and 1817, 1 Rev. Stat. ch. 57, that the matters and things therein authorized are to be done by force, simply, of the order of the Court acting in the matter of the lunatic, upon the petition of the committee or other person interested.

It must, therefore, be certified to the Court of Equity of Warren, that, in the opinion of this Court, the decree is erroneous, and that the same should be reversed, and the demurrer sustained, and the bill dismissed at the costs of the plaintiff.

PER CURIAM. Bill dismissed.

NOTE.—The acts of 1801 and 1817, (1 Rev. Stat. ch. 57, sec. 2 and 3,) are contained in the Revised Code, ch. 57, sec. 4 and 5. See the cases of *Latham* v. *Wiswall*, 2 Ired. Eq. Rep. 294; *In re Latham*, 4 Ired. Eq. Rep. 231, S. C. 6 Ired. Eq. Rep. 406; *Patton* v. *Thompson*, 2 Jones' Eq. Rep. 411.

THOMAS C. GREEN et al. *v.* JOHN H. CROCKETT et al. [390]

The sureties for the payment of the purchase money of land sold by the Clerk and Master, under a decree of the Court of Equity, where the title is retained unti. the purchase money shall be paid, have a right, upon the insolvency of their principal, before the payment of the debt, to file their bill to restrain the conveyance of the land, and to have it applied to their relief, even though the principal has assigned his interest in it to another person without notice, for the purpose of discharging a debt *bona fide* due to him.

The doctrine of the vendor's equitable lien, arises only in a case in which the estate has been conveyed by the vendor. If he retains the legal estate, or, after conveying it, if he receive it back by way of mortgage, he then has not a lien on the estate, but the estate itself; and the title thus withheld by the vendor is precisely analogous to a mortgage made to him.

It is not usual now to decree the foreclosure of a mortgage simply; for it is almost always more beneficial to the one or other of the parties to sell the premises. It is not erroneous, however, to decree a foreclosure, when neither party asks the court for a sale.

This Court is not disposed to review a decree upon the question of costs alone.

Costs may be given against a trustee as well as his *cestui que trusts*, when they claim adversely to the plaintiff, and deny his right altogether.

The bill, which was filed in November 1837, charged that at the November Term 1836, of the Court of Equity for the county of Caswell, it was decreed on the petition of the heirs at law of one Littleton Sledge, that a lot of land in the town of Milton, in said county, should be sold by the Clerk and Master of

said Court, upon the terms therein stated, which was accordingly done, in December following, when the defendant, John H. Crockett, became the purchaser, at the price of $151, and therefor gave his bond, at six months, to the said Clerk and Master, with the plaintiffs as his sureties; that at the time of executing said bond, the said Crockett agreed, upon the condition of the plaintiffs becoming bound for him, that if he failed to pay and discharge the bond, and the plaintiffs were compelled to pay it, the title to the said land, which was reserved until payment of the purchase money, should be made to them; that the said bond became due in June 1837, and the said Crockett having failed in business, and not having paid it, a suit was brought thereon against all the obligors, and a judgment obtained, which must necessarily be paid by the plaintiffs, as the defendant Crockett was insolvent, and had no property on which an execution could be levied. The bill then charged that the said Crockett, upon his insolvency, made an assignment of his interest in the said lot of land to the defendant, George Farley, as trustee, to secure a debt due from him to the defendants George W. Johnson & Co.; and that the said Farley and G. W. Johnson well knew, at the time of such assignment, that Crockett had never paid for said lot of land. The plaintiffs insisted in their bill, that, as they were sureties, they had a right, upon their paying the purchase money under the judgment aforesaid, to be substituted to the condition of
[391] the petitioners, who originally owned the lot of land aforesaid; and to have the title of the said land made to them, or that the land should be again sold to reimburse them.

The defendants Farley and G. W. Johnson filed their answer in April 1838, and therein admitted the sale of the lot of land, the purchase thereof by Crockett, the suretyship therefor of the plaintiff, and the insolvency of Crockett, as stated in the bill. They stated that they had understood that said purchase money had been paid by the plaintiffs; admitted that upon the execution of the bond for the purchase money, the title was retained until it should be paid, but denied that it was so done upon any agreement between Crockett and the plaintiffs, as a condition of their becoming his sureties; and if it were so, they insisted that it was a matter between the said Crockett and his said

sureties, which could in no way affect the defendants Farley and Johnson, who had no notice of it. The defendants Farley and Johnson farther denied any notice of the non-payment of the purchase money for the said lot of land, previous to the execution of the deed in trust, made by the said Crockett to Farley, for the benefit of Johnson & Co.; and they insisted that the said deed was made to secure a debt really and *bona fide* owing from the said Crockett to the said Johnson & Co.; and that therefore the assignment of the said Crockett's interest in the said lot to the said Farley, in trust, to secure the payment of the said debt, ought to be protected against the claim of the plaintiffs.

A replication was filed to the answer, and the parties proceeded to take testimony, which it is unnecessary to state, as it did not vary, materially, the facts admitted in the pleadings.

Upon the hearing of the cause, at Caswell, on the last circuit, his Honor Judge BAILEY pronounced a decree, which, after declaring the facts and the rights of the parties, proceeded as follows: "Whereupon, it is ordered, adjudged and decreed by the court, that unless the defendants Farley and Johnson shall, on or before the 1st day of December next, pay to the plaintiffs the full amount of the purchase money, that the Clerk and Master of this court shall convey the said [392] land to the plaintiffs; but if they shall, within that time, make such payment to the plaintiffs, together with all costs incurred by them, in that behalf, then, that the said Clerk and Master shall convey the title of said land to the defendant Farley. The court doth further order, that the costs of this cause, to be taxed by the Clerk and Master of this court, shall be paid by the defendants; and that execution shall issue therefor." From this decree, the defendants appealed.

W. A. Graham, for the plaintiff.

Badger, for the defendant.

RUFFIN, Chief Justice. There is no dispute in the pleadings, as to any fact material to the equity urged on the part of the plaintiffs, and on which the decree is based; and upon the facts admitted and found, the decree is, in our judgment, certainly right in substance.

It is a rule which has ripened into a maxim of equity, that sureties are entitled to the benefit of every security which the creditor gets against the principal. So clear and strong is this title of sureties, that if the creditor gives up a security which, if preserved, would have produced payment to the creditor, or indemnity to the surety, it has been held in many cases, that the creditor can no longer look to the surety, but the latter is discharged altogether; or *pro tanto*, according to the value of the surrendered security. Not to look further back, the recent cases of *Cooper & Arrington* v. *Wilcox*, *Ante* 90, and *Nelson* v. *Williams*, *Ante* 118, before ourselves, are instances of the application of this principle, and illustrate it. If this rule is not to be abrogated, the plaintiffs must be relieved, as asked by them. This, it was admitted in the argument at the bar, is correct, if the creditor take a mortgage by way of further security. But the present was not deemed a security of that sort; but was likened to that security of a vendor for the purchase money, which has received the distinctive name of the vendor's equitable lien; which is personal to the vendor, and of which the benefit cannot be imparted to any other person. The Court thinks otherwise entirely. The doctrine of the vendor's equitable lien arises only in a case in which the
[393] estate has been conveyed by the vendor. If he retain the legal title, or, after conveying it, if he receive it back by way of mortgage, he then has not a lien on the estate, but the estate itself; and the title thus withheld by the vendor is precisely analogous to a mortgage made to him. In each case, the legal title is in him; and in the view of a Court of Equity, he has it as a security for the sum due to him, which he is required, in good faith, to make to enure to the benefit of a surety for his debt, as well as for his own benefit. The decree is, therefore, deemed by us right in its principle.

As the principal debtor had become insolvent, the sureties, in respect of their liability, had a right, before paying the debt, to file their bill to restrain the conveyance of the land, and to have it applied to their relief. *Williams* v. *Helme*, 1 Dev. Eq. 151; *Bunting* v. *Ricks*, *Ante* 130. But it is admitted in the answer, that subsequently to filing the bill, the plaintiffs paid the debt, so as to entitle them to an immediate decree in the

nature of one foreclosing a mortgage; such as was pronounced on the circuit. As has been remarked more than once by the Court, it is not usual now to decree a foreclosure simply; for it is almost always more beneficial to the one or other of the parties to sell the premises; and, therefore, the Court, upon the application of either, directs an account of the debt, interest and costs, and a sale for their satisfaction. *Fleming* v. *Sitton*, 1 Dev. & Bat. Eq. 621. It is not erroneous, however, to decree a foreclosure, when neither party asks the Court for a sale; and it does not appear that such an application was made in this case. Should either of the parties now desire it, the Court is quite willing that the decree should be so modified as to direct a re-sale of the premises by the Master, instead of a conveyance by him to the plaintiffs; and in that form it will be substantially an affirmance of the decree of his Honor.

This decree was also objected to as giving costs against the defendants, and particularly against Farley, the trustee for the other defendants. In the first place, the Court is not disposed to review a decree upon the question of costs alone. But, besides, we think this decree proper in that respect. The question is not respecting costs in a suit between the [394] *cestui que trust* and his own trustee, acting in good faith; in which case the trustee ought to be nothing out of pocket. But these costs are given to one claiming against both the trustee and the *cestui que trust*, who all deny the plaintiff's right altogether. It is but the common case for costs to the party prevailing; and the decree is in effect, that *the cestui que trust* shall pay the costs, because the trustee will no doubt reimburse himself for those paid by him, by charging them in the accounts of the trust.

The decree is, therefore, affirmed in all respects, unless one of the parties shall choose to vary it in the manner indicated; and the defendants must pay the costs in this Court also.

PER CURIAM. Decree affirmed.

NOTE.—As to the rights of the surety in a case like the present, see the next case of *Polk* v. *Gallant, post* 395, and the note thereto.

The doctrine of the equitable lien of a vendor, after he has conveyed the land by deed, has been repudiated in this State. See *Womble* v. *Battle*, 3 Ired. Eq. Rep. 182; *Cameron* v. *Mason*, 7 Ired. Eq. Rep. 180.

[395] THOMAS G. POLK *v.* STEPHEN M. GALLANT.

A purchaser at a sheriff's sale, even when the defendant in the execution has the legal title, and much more when he has but an equity, succeeds only to the defendant in the execution, and is affected by all the equities against him.

It is only the honest purchaser of a legal title, whom equity will not disturb. If the purchase be of the legal title, but with notice of an equity in another; or if it be only an assignment of an equity, with or without notice of a prior equity in another person, in either case the estate must, in the hands of the purchaser, answer all the claims to which it would have been subject in the hands of the vendor. Therefore, the sureties of a purchaser of land at a sale made by the Clerk and Master, under a decree of the Court of Equity, where the title is retained until the purchase money shall be paid, have a right, upon the insolvency of their principal before the payment of the debt, as against one purchasing from him *bona fide*, and without notice of the non-payment of the purchase money, to have the land sold for their reimbursement, if they have paid the debt, or for their exoneration, if they have not yet paid it.

The assignor is not a necessary party to a bill against an assignee, where it appears, from both the bill and answer, that all the interest of the assignor has been transferred.

Daniel Gallant died intestate and seised in fee of certain lands, situate in Mecklenburg County; and in 1829, upon the bill of Daniel's heirs, (of whom John Gallant was one,) the Court of Equity for that County decreed that, for the purpose of partition, the lands should be sold by the Clerk and Master, on a credit, in the decree specified. At the sale, John Gallant became the purchaser of one parcel, at the price of $420, and gave his bond therefor, with the present plaintiff, Polk, as his surety, payable to the Clerk and Master; and that officer was to execute conveyances to the purchasers respectively, upon the payment of the purchase money. In February 1832, John Gallant assigned his interest in the land to his son, Stephen M. Gallant, without having paid any part of the purchase money; he being then insolvent, and residing, as well as the son, in South Carolina. In 1833, the surety, Polk, filed this bill against John Gallant and Stephen M. Gallant, and besides the circumstances above stated, therein further charged, that the assignment from the father to the son was voluntary, and without any valuable consideration, and with knowledge

on the part of the latter, that the former had not paid [396] his bid, or any part of it, nor obtained a conveyance; and also, that John Gallant had directed the application to other purposes of his own share of the moneys arising from the sales of all the lands, and that it had been so applied; by means of all which, the bill alleged that the plaintiff was in danger of being compelled to pay the said bond; and that the only fund from which he could expect exoneration or indemnity, was the land itself. The bill then prayed that an account might be taken of the sum due on the bond, and the same raised out of the land, and applied to the debt in discharge of the plaintiff.

After the bill had been taken *pro confesso* and set down for hearing *ex parte*, as to John Gallant, the cause abated as to him, by his death.

Stephen M. Gallant answered, that he agreed to give his father the sum of $421 for the land, the same being the full value thereof; and that he paid that sum without any knowledge that the original purchase money had not been paid by his father; that he soon discovered that, at the time of his own purchase, there was a judgment and execution against his father, on which he was advised the land was liable to be sold; and that it was sold by the sheriff, and this defendant again became the purchaser, at the price of $161; which had been a clear loss to him. At the sheriff's sale, the answer stated no doubt to have existed of the title being good.

To the answer the plaintiff replied, but no proofs were taken by either party.

D. F. Caldwell, for the plaintiff.

Alexander and *Hoke*, for the defendant.

Ruffin, Chief Justice.—The cause is brought to hearing without evidence, upon the bill, answer and replication; and, from the pleadings, the case is as follows: (His Honor here stated the case as above, and then proceeded.) Upon the argument, the counsel for the defendants placed not much stress on the defences brought forward in the answer; and we think very properly, as they are clearly insufficient. In the first place, the sheriff's sale is no bar, even if a legal title had been

[397] the subject of it, as the purchaser only succeeds to the defendant in the execution, and is affected by all the equities against him. *Freeman* v. *Hill*, 1 Dev. & Bat. Eq. 389. Much more must this be so, when the defendant in the execution has himself but an equity. If it be of that kind which is liable to be sold, the purchaser can only claim to stand in the shoes of the debtor, and get a title only by doing those acts, on the performance of which the debtor himself would have been authorised to ask for a conveyance.

Precisely on the same footing stands the purchase of the son from the father himself; which was of an equity only. It is only the honest purchaser of a legal title, whom equity will not disturb. If the purchase be of the legal title, but with notice of an equity in another; or if it be only an assignment of an equity, with or without notice of a prior equity in another person: in either case, the estate must, in the hands of the purchaser, answer all the claims to which it would have been subject in the hands of the vendor. Between mere equities, the elder is the better.

Against the present defendant, then, the plaintiff is entitled to all the relief which this Court would have given him against the original purchaser, for whom he was surety. We have, during the present term, in the case of *Green and others* v. *Crockett and others*, applied the equity between principal and surety to a state of facts substantially the same with the present, and decreed for the sureties; and in so doing, we have laid down no new principle, nor made a novel application of an old one. Neither the purchaser nor his assignee could get the title, without paying the purchase money; and if the surety paid it, the vendor ought not then to convey, but hold the title for the indemnity of the surety, who has a right to it by substitution. But when the principal is insolvent, the surety, although he may not have paid the money, has an immediate equity to subject the land, because that has then become, in fact, the only fund to which he can have access, and as between it and the surety, is, as it were, the principal debtor, and not simply a collateral security. We are not speaking of the rights and duties of the creditor and surety, as between themselves, but those which arise between the surety and his prin-

cipal, or the principal's assignee. As to these last, there [398] is a plain and strong equity, when it is admitted or ascertained that the original debtor is personally disabled from furnishing any means for the exoneration of the thing pledged, that such pledge should forthwith be applied to the purposes for which it was created, in discharge or diminution of the surety's responsibility.

It was, however, insisted for the defendant, that his father was a necessary party; and that the plaintiff cannot have a decree without reviving the suit against his heirs. There are two answers to this objection. The one, that the defendant is stated by both the bill and the answer to be the assignee of all the interest his father had; and, therefore, the latter is not a necessary party, as there could be no relief decreed against him; and the only effect of having him before the Court would be to conclude him. *Thorpe* v. *Ricks*, 1 Dev. & Bat. Eq. 613. The second answer is, that what is required in the argument exists in fact; for the present defendant is admitted in the answer to be the son of John Gallant; and the latter is dead without, as far as appears, leaving any other child, or having made a will; and so, the defendant is his only child and heir. It cannot be requisite to bring him in as heir by bill of revivor, because the plaintiff does not seek to charge him as heir to any purpose whatever.

We think, therefore, that it must be referred to the Master to inquire what is due for principal and interest of the debt for which the plaintiff is liable, as stated in the pleadings; and that it must be declared that the land, also mentioned in the pleadings, is liable for the sum that may thereupon be found due, and for the costs of the plaintiff in prosecuting this suit; and if the defendant shall not pay such principal, interest and costs, within some reasonable time, it must be ordered that the Clerk and Master of Mecklenburg sell the land, and out of the proceeds pay, in the first place, the principal money and interest due on said debt; and in the next place, the said costs, if sufficient therefor.

PER CURIAM. Decree accordingly.

NOTE.—As to the rights of a surety in a case like this, see *Green* v. *Crockett*, [Dev. & Bat. Eq., Vol. II.—*26.]

ante 390; *Arnold* v. *Hicks*, 3 Ired. Eq. Rep. 17; *Smith* v. *Smith*, 5 Ired. Eq. Rep. 34; *Egerton* v. *Alley*, 6 Ired. Eq. 188. Upon the question of what a purchaser at Sheriff's sale acquires by his purchase, *Flynn* v. *Williams*, 1 Ired. Rep. 509; *Rutherford* v. *Green*, 2 Ired. Eq. Rep. 121; *Reed* v. *Kinnaman*, 8 Ired. Eq. Rep. 13.

The general rule is that the assignor is a necessary party, and the present case is an exception to it. See *May* v. *Smith*, Busb. Eq. Rep. 196; *Carter* v. *Jones*, 5 Ired. Eq. Rep. 196.

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[399] JOHN HUTCHINS et al. *v.* MATTHEW McCAULEY, Ex'r of CHARLES McCAULEY.

If a note, discounted at bank for the benefit of a principal with three sureties, be discharged at maturity by the proceeds of another note, discounted with only two of the sureties, the third having died before the first note fell due, the estate of the latter will not be liable to contribute, upon the insolvency of the principal, and the payment of the renewal note by the sureties thereto, although when they executed it, they supposed the estate of the deceased would be liable upon it.

The bill stated that one Adams, as principal, procured a note, to which the plaintiffs and the defendant's testator were sureties, to be discounted at Bank. That Charles McCauley died before this note came to maturity; and that Adams, for the purpose of raising money to meet this note, offered another note with the plaintiffs only as his sureties, which was discounted, and the proceeds applied to the satisfaction of the first note. Adams afterwards became insolvent, and the plaintiffs, as his sureties on the second note, were sued, and had to pay a large portion of the debt. The bill then stated, that at the time the debt was renewed by giving the second note, the plaintiffs did not suppose that Charles McCauley's estate was thereby released, but believed that it would be equally bound with themselves, for any deficiency on the part of their principal. The prayer was, that the executor of Charles McCauley might be decreed to contribute to the loss sustained.

To this bill the defendant demurred, and his Honor Judge Bailey, at Orange, on the last circuit, sustained the demurrer, and the plaintiffs appealed.

No counsel appeared for the plaintiffs in this Court.

Waddell, for the defendants.

DANIEL, Judge, after stating the case as above, proceeded as follows: It appears by the bill, that when the first note came to maturity, it was paid by Adams. The circumstance of Adams having raised the money to extinguish the first note, by borrowing of the bank, on the second note, according to the rules of accommodation of the bank, did not, by any principle of equity that we are acquainted with, carry [400] the name of Charles McCauley, or his estate, as surety to the second note, or to the debt thus contracted. By the cancellation of the first note, the suretyship of Charles McCauley was brought to an end. And any impression to the contrary, which might have rested on the minds of the plaintiffs, does not help their case. The demurrer was properly sustained, and the decree must be affirmed with cost.

PER CURIAM. Decree affirmed.

NOTE.—Upon an analagous principle, see the cases of *Hall* v. *Whitaker*, 7 Ired. Rep. 353, and *Brooks* v. *King*, 1 Jones' Rep. 45. When the old note in bank is paid off, that debt is discharged, and it makes no difference whether it is done by money borrowed of the bank by a new note, or obtained as a loan from some other person. In either case it is a new debt, and has no necessary connection with the old debt.

SAMUEL B. SPRUILL et Uxor et al. *v.* HENRY J. CANNON, Adm'r of ROBERT CANNON, et al.

An administrator is not entitled to commissions on the value of specific articles; though for his trouble and responsibility in respect to them, it is proper to have regard in estimating a proper commission on the receipts properly so called, that is to say, moneys.

If it appear that an administrator has not used the funds of the estate, and has not made any profit from them, he is not chargeable with interest, if the funds were not wantonly kept idle, but were kept for the purposes of the trust; and they shall be taken to have been so kept, when it appears that a bill was filed for the settlement of the estate, and the funds were kept ready, to be paid over to the next of kin.

An administrator, who is also one of the next of kin, is not chargeable with interest on a sum not exceeding his share of the estate, loaned out after he was ready to settle the estate and kept a large amount on hand to be paid over to the other next of kin.

The court will so far rely upon the judgment of the master as to the proper rate of commission to be allowed an administrator, as to make it a general rule not to depart from it, except in a clear case of mistake by the master.

The court will not decide an exception relating to a matter solely between two of the defendants; particularly where the exception is stated to have been taken to avoid a conclusion between them by the report.

The bill was filed for an account of the personal estate of Robert Cannon, deceased, of which his son, the defendant Henry J. Cannon, was the administrator. The intestate died in July 1833, and the administration was taken in August following. In February 1834, the widow intermarried with the plaintiff, Samuel B. Spruill, and in August following, he
[401] filed this bill against the administrator, and against the other five children of the intestate, who were all infants. At the same time, a contest occurred between the plaintiff, S. B. Spruill, and the defendant, H. J. Cannon, for the guardianship of the infants; which terminated in October 1836, by the appointment, in the Superior Court, of the plaintiff as the guardian of some of them, and of the defendant for the others; and the bill was amended by making the wards of Mr. Spruill also plaintiffs.

Upon a reference to take the usual accounts, the commissioner found the value of the personal estate that had come to the administrator's hands, to be $49,652 10, and the disbursements and charges to be $3,783 09, leaving a balance for distribution of $45,869 01. In the accounts rendered by the administrator, he exhibited minute entries of all the interest received by him on the debts contracted in the intestate's time, and also on the notes taken by himself for sales; which together amounted to a considerable sum. As he collected money in 1833 and in 1834, until the second marriage of the widow, he loaned the same out, to the amount of $7,500, and accounted also for the interest accrued thereon, until the principal was repaid, several years afterwards. In 1835 and 1836, the administrator collected considerable sums from time to time, and placed the same in Bank to his credit as administrator; and the amount there accumulated until, in October 1836, it reached the sum of $18,831 10. The administrator made various payments to the plaintiff, Spruill, on account of his wife's distributive share; and immediately after Mr. Spruill was appointed the guardian of some of the children, he paid over to him the sum of $10,500 on account of their shares; and continued to

make payments afterwards, as other funds were got in. During these transactions the defendant, H. J. Cannon, loaned out certain sums, amounting in the whole to less than the distributive share which he was entitled to retain; and for the interest on those last loans he did not account. The administrator put in his affidavit, in which he stated that he had fully set forth in his accounts, all other sums received for interest, except those just mentioned; and that he did not account for those, because he considered them to belong to himself. The [402] commissioner reported that, from various calculations made by him, he was satisfied the administrator had correctly accounted for all the interest received by him; and that he ought not to have put out on loan the sums which he collected in 1834, and afterwards; but that he properly kept the amount in deposit, to answer the demands of the next of kin.

The intestate left some small articles of jewelry, and a few slaves, of the value together of $2,536, which were divided and delivered over specifically to the next of kin. The Master allowed the administrator a commission of 3 per cent. on the receipts, including therein that sum of $2,536.

The plaintiffs excepted to the report, because the Master allowed the commission on the value of the slaves and jewelry; and because he did not charge the administrator with the interest made by him, and with what he might have made while the money laid in Bank.

Badger and *W. H. Haywood*, for the plaintiffs.

Iredell, for the defendants.

RUFFIN, Chief Justice, after stating the case as above, proceeded as follows: We think the former of the plaintiff's exceptions is well founded. It is against the course of the Court to allow a commission on the value of specific articles. For trouble and responsibility in respect to them, it is usual to have regard in estimating a proper commission on the receipts, properly so called, that is to say, moneys. If the Master had, in this case, therefore, increased the rate of commission on that account, the Court would not have interfered. But we should be reluctant to establish a precedent for a commission *eo nomine*,

for dividing slaves and family jewels among an intestate's family; as it might lead to much abuse.

We concur in the views taken by the commissioner, of the question of interest. The case is fully within the rules hitherto laid down by the Court. *Arnett* v. *Linney*, 1 Dev. Eq. 369; *Peyton* v. *Smith*, ante 325. It is clear the administrator has not used the fund, and that no actual profit was made from it, except such portion as properly belonged to him in his own right. As it has been kept on hand—and upon that [403] point there can be no dispute, as the bank books shew it was there—the only question is, whether it was wantonly kept idle, or was kept for the purposes of the trust. We think it would have been imprudent, in a high degree, in the administrator, to have loaned the money, when a suit was actually pending respecting it, and he could not tell at what moment a guardian would have authority to require payment of the shares of the infants. Besides, the object of keeping the fund in Bank is made fully to appear, by the fact that the administrator paid it over as soon as he knew to whom to make the payment, that is to say, immediately upon the appointment of the guardian. It was kept as the property of the next of kin, ready to be delivered to them whenever the administrator could be legally warranted so to do. As to the sums put at interest on his own account, our opinion is, that the administrator, who was also one of the next of kin, was not obliged to lock up his own share in Bank, because the other next of kin were infants. If he used no more than belonged to him in his own right, or as guardian, he did the others no wrong thereby; and, therefore, ought not to account for that interest, as a part of the testator's estate in the administrator's hands. So that the question really is, whether the administrator failed to make profits from that part of the money which belonged to the plaintiffs, from wrong or right motives; and upon that question we have just said, that he properly, under the circumstances, kept it ready for payment. This exception, therefore, is disallowed.

The defendant has also excepted, because the commissions allowed are not adequate, and because there is no commission allowed for disbursements for the children up to the appoint-

ment of guardians. As to the last, we suppose the commissioner considered the trouble of the administration touching those matters, in making the other allowances; and, therefore, we are not inclined to alter his decision, when it does not appear that any application was made to him for this commission specifically. The Court must also so far rely upon the judgment of the Master, as to the proper rate of commission, as to make it a general rule not to depart from it, except in a clear case of mistake by the Master. He has the whole subject before him, and can better estimate than we can the time and trouble devoted to an administration, and the re- [404] sponsibility incurred. We see no reason here for not abiding by the report in this respect.

As to the defendant's third exception, we presume the Master accidentally overlooked the sum mentioned therein, as we see no reason why the defendant should not have thereon the same rate of commission allowed on the other rents of the real estate; to-wit: 2½ per cent.

The Court does not decide the sixth exception of the administrator, because it relates to a matter solely between two of the defendants, whom we do not think proper to conclude in this suit. Indeed, the object of the exception was stated by counsel to be, simply to avoid a conclusion between those defendants by the report.

PER CURIAM. Decree accordingly.

NOTE.—See *Graham* v. *Davidson*, *ante* 155, and the cases referred to in the note, on the subject of commissions and interest.

THOMAS G. WALTON et Uxor et al. *v.* ISAAC T. AVERY et al., Adm'rs of JAMES MURPHEY. [405]

In a trial at law, on the plea of fully administered, the allowance of commissions to the executor or administrator, by the County Court, under the act of 1799, 1 Rev. Stat. ch. 46, sec. 29, is definite and conclusive. But in a suit in equity, for the settlement of the testator or intestate's estate, the subject of commissions is incidental to the settlement of the executor's or administrator's accounts; and the court will consequently take cognizance of it, and correct an improper allowance of commissions made by the County Court.

In a suit in equity for the settlement of an executor's or administrator's accounts,

though the *ex parte* order for the allowance of commissions made in the County Court is not conclusive, it is entitled to much respect, and it is not proper to vary it, unless it be founded on a mistake of the law, or the rate be clearly excessive.

Slaves inventoried by an administrator, and delivered over to the next of kin, are not "receipts" within the meaning of the act of 1799, so as to entitle the administrator to a commission on their value, even though they may have been recovered by him for his intestate's estate in a suit at law, though the trouble of managing them may properly be taken into consideration in estimating the commissions to be allowed on the receipts proper.

A set-off allowed by an administrator in reduction of a debt due the estate, is not such a "receipt" whereon the act of 1799 allows a commission. The balance is the true debt in the case of a set-off, and that balance is the receipt within the statute.

Bonds which were in the hands of the intestate as a trustee, and which his administrator delivers over to the true owner, is not a "disbursement" on which the act of 1799 allows a commission.

An allowance made in the County Court of 5 per cent. commissions to administrators upon the receipts and disbursements of a large estate, reduced by the Court of Equity in a suit brought to correct such allowance, to 2½ per cent., where the administrators, under an arrangement with the guardian of the infant next of kin, paid over to him bonds, instead of collecting them and paying over the money.

Administrators are not to be charged with interest on money which they honestly retained, under an impression that it belonged to them, the same having been allowed them as commissions by an order of the County Court, especially when they interposed no delay in a suit brought in equity for the purpose of correcting the allowance.

An order of the County Court, passed before the administrator's accounts were made up and ready for settlement, fixing the rate of commissions to be allowed him, but without specifying any sum on which the commissions were to be calculated, nor giving the amount of them, is so loose that it ought to be reformed on that account.

In January 1832, the defendants administered on the estate of James Murphey, who died intestate, and left the plaintiffs, his infant grand-children, his next of kin. His estate was [406] considerable, and, except five, his slaves were sold, and also the perishable property, to the value of $38,658 41. There were also a number of debts due to him on bonds, notes and accounts. From these sources, including the interest accrued on the debts to the intestate, and on the proceeds of sales, the administrators received assets to the value of $66,615 43½, over and above the value of the five slaves. The administrators paid debts of the intestate to the amount of $9,869 43¾. The

plaintiffs all had the same guardian, and it was agreed between him and the administrators, in order to keep the funds of the children at interest, and the better to secure the money due the estate, that the administrators should take bonds with good sureties for debts due the estate, and made payable to the guardian, and that the latter would receive such bonds in payment as cash. The business was accordingly conducted in that manner, and the sum of $54,699 76¼ thus paid to the guardian for the plaintiffs; whereof the sum of $33,884 63½ was paid in October 1833, and $16,566 65 on the 1st of May 1835, and the residue in 1836 and 1837. One of the five slaves, not sold, was in the possession of another person, against whom the administrators were under the necessity to bring an action of detinue to recover the negro, who was of the value of $625. The other four were of the value of $1,590; and at those values the guardian took them and gave a receipt to the administrators.

The intestate had been the guardian of certain infants, and at his death owed them a sum of money which he had received of theirs, and also held bonds payable to him as their guardian for $237 26. The intestate had also been administrator of his only child, who had died intestate, leaving the present plaintiffs his children; and the defendant's intestate owed that estate upwards of $2,000, for a balance of cash in his hands, and held bonds for the further sum of $2,936 48½, payable to him as administrator. The present defendants, in settling with the former wards of their intestate, and with the administrator *de bonis non* of the first intestate, claimed and got credit for a commission of 5 per cent. to the intestate James Mur- [407] phey; and also passed over to the wards and to the administrator *de bonis non* the bonds for the said sums, $237 26, and $2,936 48½, as cash. The defendants, in like manner, delivered over to a person bonds to the amount of $113 58, which their intestate held in trust for that person.

In settling and collecting the debts owing to their intestate, the same were reduced by the sum of $3,437 89½, for and by way of set-off, claimed by the debtors, and allowed judicially, or by the defendants themselves.

In January 1836, upon the application of the administrators, the County Court which granted the administration passed an

order "allowing them 5 per cent. commission on the receipts and disbursements of said estate," and also appointed commissioners to audit and settle the administration account. In October 1836, a report was made, upon which a balance appeared to be remaining in the hands of the administrators of $1,348 79, after giving them credit for the sum of $4,294 86 for their commissions. That sum was made by computing the commissions at the rate of 5 per cent. on the receipts and disbursements: reckoning as receipts the sums of $3,437 89½ and $2,215, being the amounts of the set-offs and values of the slaves; and also reckoning as disbursements the said sums of $337 26, $2,936 48½, and of $113 58; being the amount of the bonds delivered over to the administrator *de bonis non* and others, as before mentioned.

Subsequently the administrators disbursed the balance of $1,348 79, reported to be in their hands, in payment of demands then impending over the estate.

In October 1839, Mr. Walton having intermarried with one of the next of kin of James Murphey, and been appointed guardian for the others, instituted this bill in the names of himself, and his wife, and his wards, for an account of the estate; but alleging therein particularly no objection to the account rendered to the County Court, except in respect to the charges and allowance of commissions. As to that the bill charged that the value of the slaves specifically delivered to the guardian, and the amounts of set-off, and the bonds which the
[408] intestate James held, as guardian, administrator, or trustee, and which the present defendants delivered over to the owners, were not properly the subjects of commissions. The bill charged, secondly, that, considering the time and trouble of the defendants while employed in the administration, and that the guardian accepted payment in bonds without putting the administrators to the trouble and delay of collecting the money, the rate of commission was excessively high and disproportionate, and that as the allowance was *ex parte* and while the next of kin were infants, the order of the County Court ought not to conclude them, but that the commission ought to be reduced to a reasonable compensation.

The defendants, without waiting for service of process, put

in an answer at the same term; and therein set forth a particular and detailed account of their administration, and annexed also a copy of the account, stated by the auditors; between which two accounts there was no discrepancy, except as to transactions subsequent to the report. The accounts appeared to have been very accurately kept, and especially in respect to the interest accrued on the debts, and for interest thus arising, large sums were accounted for. With the accounts thus rendered, the plaintiffs were so entirely satisfied as to set the cause down for hearing on bill and answer. The defendants admitted therein the charges of the bill as to the several items on which the compensation was charged. But they insisted that the order of the County Court was made upon due investigation, and, as the decision of a competent tribunal, was conclusive: that the commission was properly charged upon the value of the slaves, bonds and set-offs; and that the administration was tedious, difficult and protracted, and the responsibility very great, and requiring sureties for a large amount; and that the commission was reasonable—especially as there was no charge for personal expenses in attending to the business of the estate, which were heavy, but that no account was kept of them.

In this state of the case, it was, by the consent of the counsel, submitted for decision; and his Honor Judge Pearson, before whom it was heard, at Burke, on the last circuit, allowed no commission on the amounts of set-off, or on [409] the value of the four slaves. His Honor allowed a commission of 5 per cent. on the cash collected by the defendants; and on the value of the slave which was recovered at law; and on all the cash disbursements; and a commission of 2½ per cent. on the residue of the estate which the administrator did not collect, but paid over in bonds to the guardian. And upon the admissions of the counsel, as to the probable amount of expenses for travelling, attending courts, &c., his Honor allowed therefor the sum of $400, making for all those allowances the sum of $2,851 78½.

This reduction of the amount of commissions had the effect of creating a balance in the hands of the defendants of $1,409 52, with interest on which, after two years from the administration, viz: the sum of $493 33, his Honor directed the defend-

ants also to be charged; and for the aggregate thereof, namely, $1,902 85, a decree was made in favor of the plaintiffs, and the defendants appealed.

W. A. Graham, for the plaintiffs.

Badger and *Hoke*, for the defendants.

Ruffin, Chief Justice, after stating the case as above, proceeded as follows: The argument for the defendants denies the power of the Court to re-examine the question of commissions; and if the power exists, then the propriety of the alterations made by the decree is denied. It is supposed that the jurisdiction of the County Court is exclusive; and, therefore, that the determination of that Court is conclusive upon all others. This position rests upon the wording of the act as included in the Revised Statutes, ch. 46, sec. 29, which uses the words "Courts of pleas and quarter sessions are authorized, &c." But that phraseology is not found in the act of 1799, which speaks of Courts generally. We do not suppose that this change of language is material; but it is noticed for the purpose of shewing, that if the jurisdiction be in the County Court, it arose originally out of the nature of the subject, and not out of an express grant to that Court by statute, that might perhaps impart exclusive authority over the subject. We [410] do not doubt that the Court, in the contemplation of the Legislature, is that in which the administration account is to be rendered, upon which the commission is allowed; and, therefore, that ordinarily the County Court is meant. But it does not thence follow that the allowance of that Court is absolutely definitive and conclusive for all purposes, however erroneous in point of law, or unjust it may be in its operation. From necessity it is indeed so, in trials at law, on the plea of fully administered. Juries are incompetent to the determination of the proper rate, and cannot have before them the *data* for fixing a just allowance. Different juries, too, might think differently as to the time and trouble of the executor, and of the value of time and responsibility; so that, as to one creditor, a full administration would be found, and as to another would not, as the commission was made more or less by the

jury. Hence in *Hodges* v. *Armstrong*, 3 Dev. Rep. 253, the Court said, there could not be a retainer for commissions, unless they were allowed by the Court; and it follows that when so allowed, the jury is bound to find accordingly. That, however, proceeds from the obvious mischief of any other rule at law; which lays on the Courts the necessity of adopting this. It is far otherwise with respect to the Court of Equity, when called on directly to take all the accounts of the estate, which acts once for all, in taking the final account and distributing the fund. That Court has the best means of deliberate and thorough investigation into all matters material to settling a just allowance. It cannot be supposed that the Legislature meant the statute to be more to that Court than a mandate to allow compensation, and not to render the fiat of the inferior tribunal, with inadequate means of information, imperative and conclusive as to what the decree should be. The conclusion contended for on behalf of the defendants cannot, in such a case, be supported by words of grant merely to the County Court; but would require additional words of exclusion to oust the Court of Equity of its natural jurisdiction over matters of account, and over every thing that can enter into the account. Nay, independent of that consideration, and supposing the jurisdiction to be exclusive at law, yet the Court of Equity, when the order is impeached as being unjust, is [411] bound to re-examine it, upon the ground that, as an *ex parte* proceeding, it is regarded as having been obtained by surprise, as against those who are injuriously affected by it. We think, therefore, that the subject of commissions, as incidental to the settlement of administrations, is within the cognizance of every Court exercising equitable jurisdiction in a suit for the purpose of settling those accounts; and that, upon a bill in the Court of Equity, an improper allowance by the County Court may be corrected.

It becomes, then, our duty to consider of the proper subjects of commission in this case, and of its rate; and to determine on these points between his Honor and the County Court. In the first place, we desire it to be distinctly understood, that although we do not deem the *ex parte* order for commissions conclusive, yet we regard it as entitled to much respect, and that

it is not fit to vary it, unless it be founded on a mistake of the law, or the rate be clearly excessive. The transactions of executors are often affairs of the vicinage, and the magistrates frequently possess personally the information requisite to a just determination. But, at the same time, it is well known, that while the law intends the commission as a bare compensation for trouble, time and responsibility, many persons look upon the office of executor as one of profit, and endeavor to render it such by the emoluments derived from it. It is, therefore, often proper to reduce the commission, even when it is allowed *in numero*, or after a fixed rate on a specified sum. In the present case, however, the order is so loose in its terms as to admit of abuse; and for that reason ought to be reformed. It was made in January 1836, and "allows 5 per cent. on the receipts and disbursements of the estate." In October following, the administrators made up their accounts, under the inspection of the auditors; and therein for the first time it is seen what they call "receipts and disbursements of the estate;" for the order of the Court neither specifies any sum on which the commission is to be calculated, nor gives the amount of it, but only declares the rate. The order was probably construed by the auditors contrary to the intention of the Court. But
[412] if not, we are confident that specific articles, inventoried merely by an executor, and delivered to a legatee, are not "receipts" within the meaning of the act, *on* which a commission is to be calculated. We have already so expressed our opinion during this term, in the case of *Spruill* v. *Cannon*. We are not aware of its ever having been done, much less that it is usual. It may be very proper to take into consideration the trouble of managing the slaves, in estimating the commission on the receipts properly speaking. But the law provides no means of putting a value on the slaves, so as to lay a foundation for a commission. We are equally clear, that a set-off in reduction of a debt to the intestate, does not fall within the description of "receipts." Suppose there were set-offs to all the debts: could the administrator repel the last, upon the ground that if allowed there would be no fund to pay his commission? The balance is the true debt in case of set-off; and that balance is the receipt within the statute. So the bonds, which were in

the hands of the intestate as a trustee, did not belong to him; and delivering them to the true owners was not an "expenditure" for the estate of the intestate. These items amount together to $8,940 22, and thereon a commission of 5 per cent. viz: the sum of $447 01 was improperly charged under the order of the County Court. In our opinion, his Honor was right in disallowing it as far as he did; and he ought to have gone further, and refused the commission of $31 25, given on the value of one of the slaves—in which particular the decree must now be corrected.

The commission on the residue of the estate, which the administrators paid over in bonds to the guardian, the decree reduces from 5 to 2½ per cent.; allowing on $50,818 29 the sum of $1,270 45, instead of $2,540 90. We approve of the decree in this respect, and accordingly affirm it. Regularly there ought to have been a reference to the Master to state the facts specially, and to settle the allowance; and so, if either party had requested it, or if the facts had been uncertain or complicated, it would doubtless have been directed. But, in this case, almost the whole subject of controversy is the question of commissions; and the charges of the bill and statements of the answer are special and circumstantial as to all mat- [413] ters that can affect the decision. The cause is tried upon the bill and answers, so as to give the defendants the full benefit of their own statements as being entirely true. Taking the answer as our guide, we concur in the opinion of his Honor on the point under consideration, and therefore do not deem it necessary to send the case to a Master. By the decree, after deducting the before mentioned sum of $31 25, the allowances of the defendants amount to $2,820 53½. The burden of the administration was much lightened by the agreement of the guardian to accept the bonds instead of the money; which enabled the administrators to avoid much responsibility, and to close the business at comparatively an early day. The estate was principally paid over in less than two years; and we think the sum fixed must fully compensate for the time and trouble of these gentlemen in doing the business of the estate, while they were at the same time attending to their own. The management of the estate seems indeed to have been unexception-

able, and the accounts perfectly plain and true; for in no respect are they questioned, except on the point of the allowances solely. The administrators ought, therefore, to be amply compensated; and in adopting the sum mentioned, we consider that they are thus compensated.

We do not, however, approve of the charge of interest against the defendants, and especially from the period specified in the decree. The defendants have not sought any delay in this suit, not even that of having process served in the ordinary course. They answered at once, and in a full and precise manner; so that the plaintiffs set down the cause to be heard instantly upon the defendants' own statements. This shews no consciousness of error; but on the contrary, that the defendants believed they had no money but their own. In reality, they retained by an authority apparently lawful and without fraud on their part, or objection from the other side. They could not suppose they owed the plaintiffs any sum whatever, much less know what it was. Until the bill was filed, therefore, it does not seem there was any ground for charging interest; and in that respect also, we think the decree must be corrected. With those
[414] modifications, the decree must be affirmed; but we do not think it a case for costs, either in the Court below, or in this Court.

PER CURIAM. Decree affirmed.

NOTE.—The act of 1799, (1 Rev. Stat. ch. 46 sec. 29,) as amended by the acts of 1846 ch. 1, and 1852 ch. 158, is contained in the Revised Code, ch. 46 sec. 38. See *Graham* v. *Davidson*, *ante* 155, and the cases referred to in the note, on the subject of commissions and interest.

SAMUEL RALSTON, Adm'r of SAMUEL RALSTON, Jun'r, *v.* HUGH TELFAIR et al.

Although it be admitted, that by actions of trover, assumpsit or account, an administrator, after the recall of the probate of a supposed will, might have remedy at law against one who acted as executor under it, yet equity has jurisdiction to decree an account in such case, as being a more complete remedy, and that particularly where a part of the plaintiff's demand is of such a nature that there is no jurisdiction at law; and in such suit in equity, the defendant will be treated as an executor or trustee, and made chargeable

with what came to his hands of the trust fund, and also with such part thereof as he may have released or disposed of for purposes of his own; and he must make good what may have been lost by his bad faith, or gross neglect; and he will be entitled to be credited with all sums paid in discharge of debts owing by the deceased; and for all payments of legacies under the supposed will, made before he had a reasonable ground of belief that the paper was not a will, as it purported to be; and he will also be entitled to a fair compensation for his services done to the estate in the administration of it.

If one, acting as executor under a supposed will in which he was interested beneficially as a residuary legatee, make an agreement with the surviving partner of his testator, in relation to the partnership concern, by which he surrenders to him a part of the effects of the concern, he will be responsible therefor, if the same be not for the advantage of the estate, to the administrator of the deceased, upon the recall of the probate of said will, although the administrator may have a remedy against such surviving partner.

An executor, acting under a supposed will in which slaves were directed to be emancipated, is not to be charged with the hires of such slaves, when they have been allowed to work for themselves, and the executor has made no profit from them.

The costs incurred by the defendants in a suit in equity, brought by a party claiming under a supposed will against the executors who claimed for themselves adversely to the plaintiffs under the same will cannot [415] be allowed the defendants, in a suit against them for an account, brought by the administrator of the deceased, after the recall of the probate of the said will. Nor can the cost of resisting the proceedings to recall the first probate and attempting to obtain a second, be so allowed; for although an executor, acting entirely or mainly for the benefit of other persons provided for in a supposed will, ought to be protected from loss by a faithful, or what was properly deemed a faithful, effort to carry into effect the apparent will, yet where the executor is solely, or almost solely, interested under the will, he is to be taken as acting for himself, and if he fail, must pay the costs of the litigation.

It is not a fit matter of exception to a report, that one of the two commissioners who united in, and signed it, afterwards altered it without the privity of the other. If the objection be true, in point of fact, the party should verify it on affidavit, and apply to have the whole report set aside, or restored to its first form.

Samuel Ralston died in Pitt county, on the 11th day of February 1829, and at the succeeding May Term of the County Court, the defendants, Telfair and Blount, offered for probate a paper writing, dated the 7th of February 1829, purporting to be the will of Ralston, whereof they were the executors; and they procured the probate thereof, and letters testamentary to be issued to them jointly. By that instrument, Ralston directed four of his slaves to be emancipated; and that another

named Abram should be sold to discharge a note then outstanding, which was given for the price of the said slave; and gave a legacy of $1000 to Franklin Gorham. He also directed that Churchill Perkins should collect the debts due to him, and pay those he owed, and then "pay the remainder to the executors, to be disposed of as they may think fit;" and he then added, that "all the remainder of my property shall be disposed of as my executors think proper." Samuel Ralston, the supposed testator, was a native of Ireland, and his next of kin was his father, Samuel Ralston, then resident in Ireland. He had no notice of the death of his son, or of the existence of the paper, until some months after probate had thereof; and upon hearing of the same, he filed his bill, in the Court of Equity, against the said Telfair and Blount, insisting, that by the true construction of the instrument, the executors received
[416] and held the personal estate in trust for him as next of kin, and not for the personal benefit of the executors themselves. To that bill the defendants put in answers, in which they insisted that they were the legatees in the said paper for their own benefit, and not in trust for the father. Upon the hearing of that cause, the bill was dismissed by the Court. Immediately thereafter, Samuel Ralston, the father, instituted a suit in the County Court, for the purpose of having the probate of the supposed will recalled; and it was finally so ordered in this court. Telfair and Blount then again offered the paper for probate, and a *caveat* was entered against it by Samuel Ralston, the father, and an issue made up thereon; and after a verdict, the paper was finally pronounced against; and the party deceased declared to have died intestate. Administration was then taken by the present plaintiff, who received from Telfair and Blount, or took into his possession, the slaves left by the intestate, and then filed this bill against the said persons, praying an account of the estate, all of which, as the bill alleged, came to their hands, and to a large amount; and that they might be decreed to pay to the plaintiff what might be found to be justly due to him, upon the taking of the proper accounts. The answers of the defendants positively stated their full belief, at the time they procured the probate of the paper and acted under it, and resisted the recalling of the probate,

that the same was the will of Samuel Ralston; and insisted that they acted honestly, and with a sincere desire to execute the will of their supposed testator, in defending all the before mentioned suits, and in administering the estate according to the provisions of the said supposed will; and they claimed to deduct out of the estate in their hands, or that came to their hands, such sums as they paid in discharge of the debts of the deceased, legacies given in the said instrument, and all costs and expenses to which they were put in defending those suits; and also that they were entitled to the usual and proper charges for collecting and settling the estate.

At the death of Samuel Ralston, he and Churchill Perkins, who was mentioned in the supposed will, were in co-partnership in a store in Pitt. Perkins entered a *caveat* against the probate of the will; and it was thereupon agreed by [417] Telfair and Blount of the one part, and Perkins of the other, that Perkins should withdraw his *ceveat*, should give up the privilege and compensation for collecting the debts due to Ralston, and deliver over the bonds and other evidences of those debts; and also should give up to Telfair and Blount the debts due to Ralston & Perkins, and surrender the books of accounts of those latter debts; and that therefor, and for the sum of $1000, which Ralston owed Perkins, and for the interest of Perkins in the profits and effects of the firm of Ralston & Perkins, he, Perkins, should retain specific articles of merchandize, and certain bonds due to Ralston, to the value of more than $3000; which was done according to the several stipulations.

To speed the cause, the parties consented to a reference to commissioners to take the accounts, but without prejudice to any objection on the part of the defendants to their liability in this suit. A report was made, to which each party took numerous exceptions; and by the agreement of the counsel, the cause was brought on to be heard, and at the same time, if the bill should be sustained, to be decided on the report and exceptions.

J. H. Bryan and the *Attorney General*, for the plaintiff.

Badger and *Iredell*, for the defendants.

RUFFIN, Chief Justice, having stated the case as above, proceeded as follows: The jurisdiction of the Court of Equity in this case cannot, we think, be seriously questioned. Admitting that by actions of trover, assumpsit, or account, the administrator might have remedy at law against one who acted as executor under a will of which the probate has been recalled, because it was not a will, yet there must also be a jurisdiction here. The remedy in Equity is more complete in matters of account, which is the ground of the equitable cognizance of such cases. The Court of Equity has peculiar facilities of investigating accounts, to which, when long and complicated, a jury is altogether incompetent. But it is said for the defendants, that here there is no complication and no mutual account, because the plaintiff has no accounts against the defend-
[418] ants. But the argument is not ingenuous. The plaintiff and defendants may not literally have accounts with each other; but the claim of the plaintiff against the defendants involves the administration, for about eight years, of a considerable estate; and that may be said necessarily to include numerous charges and discharges, and to constitute a case and matter of account fit to be settled in this Court. It stands much on the footing of a suit by an administrator *de bonis non* against the executor of a first administrator; in which, although trover or detinue might lie for the specific things, and assumpsit for money collected, it is the constant course to proceed in equity. If, in such a case, the plaintiff were to proceed by actions at law, and injustice were done therein to the other party, for want of just allowances for disbursements or charges, it would seem impossible that a Court of Equity would allow the plaintiff at law to raise the money from the other party, until the accounts had been taken here and all proper credits ascertained. It is for the advantage of the defendants themselves, that this jurisdiction should be exercised in the first instance. We think, therefore, if there were nothing peculiar in this case, the bill would be proper.

But here, a part of the plaintiff's demand is of a nature of which there is no jurisdiction at law; that is the sums collected by the defendants on the debts of Ralston & Perkins, and the value of the effects released or assigned by them to Perkins.

In those effects the legal interest vested in the surviving partner, and the administrator of the deceased partner can only claim in equity. If it be said, the plaintiff must go against Perkins for that demand, the answer is, that he has a right to follow the fund in the hands that hold it, and that he may treat the defendants as his agents in the transaction; and for that reason he may call them before this Court, for that equitable demand.

Upon either ground, we think the jurisdiction proper; and especially upon the pleadings as framed in this cause. The bill does not charge the defendants with procuring the will by improper means, or endeavoring to obtain the probate, or uphold it by fraud or falsehood; but alleges only, that in fact it was not the will of the deceased, and that the defendants were induced to resist all the claims of the next of kin [419] solely for their own personal advantage, as supposed legatees in the paper. That conduct is consistent with honesty of purpose. Hence, the defendants are not treated as wilful wrong-doers, or called on to answer as *tort feasors;* but the bill is simply for an account of the transactions in which these defendants assumed to act as executors, and therefore as trustees, or *quasi* trustees. We think they are liable to an account in such a case, and that they are to account precisely upon the principles upon which they would have been liable, if they had in reality possessed the character of executor, with which they thought themselves invested. They are chargeable with what came to their hands of the trust fund; with such part thereof as they may have released or disposed of for purposes of their own; and they must make good what may have been lost by their bad faith or gross neglect. They are entitled to be credited with all sums paid in discharge of debts, owing by the deceased; for in the hands of the plaintiff, the fund would have been thus far chargeable; and consequently, such payments are proper deductions in favor of the defendants. But, that is not all; for we think the defendants are likewise entitled to a fair compensation for services done to the estate, in the administration of it, and to be credited with all payments under the supposed will at least, before they had a ground of reasonable belief that the paper was not a will, as it purported to be.

The case of *Heel* v. *Stovell*, cited at the bar, from Ch. Cas. 126, and 8 Vin. Abr. 169, is founded on this principle. There, the widow was allowed for payments of legacies given by the will, though it turned out to be no will. The Court of competent jurisdiction having pronounced the instrument to be a will, an innocent person may safely act under the sentence, until it be recalled; and when called to account in a Court of Equity—however it may be at law—such person ought not to be made personally responsible for moneys paid, while the sentence was in full force, and properly paid according to a due course of administration under the instrument. If the executor of such a paper is chargeable as a trustee, then he is entitled to a trustee's privileges, and ought not to answer out of his own estate but for wilful default or culpable negligence. Honest
[420] intentions and reasonable diligence should protect him from loss, as well as other trustees.

These reasons satisfy the Court that the bill ought not to be dismissed; but that the plaintiff is entitled to relief on it. They also enable us to dispose of most of the exceptions upon what seem to us proper principles; and we shall now proceed to pass on them.

The defendant Telfair excepts to the report for charging the defendants with the value of the goods and debts assigned or released to Perkins. It is said, the defendants did not receive them, and that the plaintiff may have redress against Perkins himself, as surviving partner; and, therefore, ought not to come against these parties. So far as Ralston was indebted to Perkins, and so far as Perkins was entitled for his share in the firm of Ralston & Perkins, the allowance to him by the defendants was proper; and they must have credits therefor, when the amounts shall be ascertained. The Master has fixed the debt to Perkins as $1000, and thus far we know the proper credit. But, he has not ascertained what profit Ralston & Perkins made, nor the share thereof belonging to Perkins. It must, therefore, be referred again to him to make inquiries upon those points. The excess in value of the articles received or kept by Perkins, over and above the debt to him and his share of the profits, the defendants might have recovered from Perkins; for he had no right to them. But, it is said, they did

not recover the excess, and therefore ought not to be held answerable. We think they ought to be charged with that excess, if Perkins was able to pay, and has since become unable to pay it; simply upon the ground that they made no effort to settle and collect that demand, but suffered it to be lost. But, whether Perkins be now solvent or not, does not seem material; for the defendants not only suffered the debt to remain uncollected, but expressly sanctioned, by their agreement with Perkins, his retaining the goods. Was this agreement made for the benefit of the estate, or for that of the parties to it personally? Very clearly, the latter. It was the price of buying off Perkins's *caveat;* (which, to be sure, was unauthorised;) and also of inducing him to forego his commission on collecting the debts, and to surrender the bonds to the execu- [421] tors. Now, the executors then claimed all the property beneficially, as legatees; and it is thence plain, that they have not only appropriated this amount of the assets, but that they did it for purposes of their own. For such purposes they must pay their own money; and, therefore, are justly chargeable with such parts of the estate as were thus used.

The report submits it to the Court, whether the defendants are chargeable with hires for the negroes which the will directed to be emancipated, from whom the defendants made no profits, as they were allowed to work for themselves. It charges, however, for the hires of the other negroes; and among them, for Abram and Eunice, whom it appears the defendants sold, and of whom the plaintiff, since he administered, has obtained possession. As to the emancipated slaves, we think the defendants are not liable for their hire. It is clear they acted in that respect from a regard to the supposed wishes of their testator; for as matters then stood, they would themselves have had the profits of those slaves, if any. With respect to the hires of the others, the defendants are liable, as far as they received, or ought to have made them. Therefore, the second exception of Telfair is overruled, except as to the hires of Abram and Eunice. As those two negroes appear to have been sold, we are at a loss to know how their hires are charged, and how they come again into the plaintiff's possession. Therefore, without allowing or disallowing this exception as to them,

or the 7th exception of the defendant Blount, it must be referred back to inquire and state in respect to those two slaves, when they were sold, by whom, to whom, and for what price respectively; and whether the price has been accounted for, and by whom; and if they have come to the hands of the plaintiff, when, and by what means.

The Master states that he refused to credit the defendants with the legacy to Gorham; and for that cause Telfair further excepts. The report does not state the ground of the refusal; but although the fact of its payment is not expressly found, yet it is not denied in the report; and therefore we infer that the Master was of opinion that they were not entitled to credit for the legacy, although they had in fact paid it. For the [422] reasons already given, the Court is of the contrary opinion; and, therefore, on the third exception, it must be again referred to inquire what sum the defendants paid on that account, and when it was paid.

The fourth exception of Telfair is, that he is charged with various sums for bad debts which were not collected; and the plaintiff has taken numerous exceptions to the report, because the defendants are not therein charged with various debts that are specified, inasmuch as the debtors were able to pay, and the defendants ought to have collected them. The exception of the defendant does not object to the charging of any debt in particular, and therefore we take it as being intended to bring forward the general principle of their liability on account of laches, for more than they actually received. Upon that question, our opinion has been already expressed; and the fourth exception of Telfair must be accordingly overruled. Upon the exceptions of the plaintiff, it is to be remarked, that the defendants are chargeable only in plain cases of laches; and in this case, the presumption that they intended to do their duty, and did it, is very strong; because, at the time, they were acting, as was thought, for their own benefit exclusively. Upon this principle, the court overrules all the plaintiff's exceptions, as being unfounded in fact, except the fifth, which is allowed only as far as it respects the balance of the debt of Joshua Smith, and the eleventh and thirteenth, which are allowed.

The defendants claimed credit before the Master, as in their

answers, for large sums paid for the expenses of the suits mentioned in the pleadings, but they were not credited, and they have excepted. With respect to the costs of the suit in the Court of Equity, brought by Samuel Ralston the father, there is no pretence for charging them in this cause. The court, having a discretion, disposed of the costs by the decree in that case, as was fit. Besides, the demand was not against the defendants as executors, but was founded on a construction of the paper, supposing it to be a will, which would give the plaintiff the right to the residue of the estate, by way of trust arising on the gift to the defendants; and the defence was founded on the opposite construction, namely: that the gift to the defendants were not in trust but absolute. [423] It is plain, therefore, that the defendants were contending for their own interests, and not defending, for the benefit of others, rights committed by the testator to the protection of the defendants. As they were contending for themselves, it follows, that the expenses ought to be met out of their own means. The costs of the proceedings to recall the first probate, and of the attempt to obtain a second, stand, in point of form, upon a different footing. According to the case of *Mariner* v. *Bateman*, 2 Car. Law Repos. 464, which we entirely approve, the costs might form a just burden on the assets; for an executor, acting entirely or mainly for the benefit of other persons provided for in a supposed will, must be protected from loss, by a faithful, or what was properly deemed a faithful, effort to carry into effect the apparent will. But, in the present case, it is obvious that the contest was on the part of the defendants, for themselves, and solely for themselves, just as much as it was, on the part of the next of kin, for his benefit. The costs of the litigation ought equitably to follow the fruits of the litigation. In substance, the suits were to determine which of the parties to them were entitled to the property; and that one who lost the cause ought to pay the costs. The fifth exception of Telfair is therefore overruled.

The same defendant has also excepted, because the Master allowed no commissions to the defendant. From what has been already said it follows, that this exception is well founded, so far as respects a just compensation for the time and labor em-

ployed in the service of the estate; and it must be referred to the Master to inquire of, and fix a proper allowance on, that basis.

It remains only to dispose of the exceptions taken by Mr. Blount; which may be soon done. The first is overruled, as being unfounded in fact; as are also the third and fifth, for the same reason. The second respects the transactions with Perkins; and therefore falls within the order made upon the first exception of Telfair, for a further inquiry. The fourth respects the legacy to Gorham, and therefore falls within the order made upon the third exception of Telfair; and must accordingly
[424] await that inquiry. The sixth objects to the defendants' being charged with the sums received from Perkins, as surviving partner, upon the ground that, as such partner, Perkins is the owner. The money was actually received by the defendants, and it was equitably due to the representative of Ralston, and, therefore, must be accounted for by the defendants; and consequently this exception is overruled. The seventh has been already disposed of, in the order respecting the slaves Abram and Eunice.

The eighth objects, that after the two commissioners united in the report and signed it, one of them altered it without the privity of the other. This is not a fit matter of exception, and therefore it is overruled. If the objection be true, in point of fact, the party should have verified it on affidavit, and applied to set aside the whole report, or restore it to its first form.

Daniel, Judge, dissented from a part of the opinion of the court, and filed the following opinion: I cannot agree to so much of the opinion of the court as subjects the defendants to the demand which the plaintiff had, and now has, against Perkins, the surviving partner of the firm of Ralston & Perkins. There is nothing to prevent the plaintiff, as administrator of the deceased partner, bringing his bill, and having an account against Perkins. The defendants are made liable, in this bill, only as trustees by operation of law. The law never works an injury. I am ignorant by what principle it is, that the plaintiff can say that the defendants are by force of law their trustee, for a fund they never had, and which has not been lost to the

plaintiff by any act of theirs. Perkins never *bona fide* settled the partnership with the defendants. He therefore has no pretence to bar the plaintiff's demand for a settlement now. I cannot think that the law does make these defendants trustees for this fund, simply on the ground that they agreed with Perkins that he might have the property of the firm that he then was in possession of, if he would withdraw a *caveat* to the probate of Ralston's will. If the plaintiff could show that the estate of Ralston had sustained any loss by the agreement, then there might be some pretence for this charge. But there is nothing of that kind in the case. The opinion of my [425] brothers seems to me to be stretching the law which makes persons trustees by implication, farther than is warranted by any established decision.

PER CURIAM. Decree accordingly.

NOTE.—A payment, made by a debtor to one who has obtained letters testamentary or letters of administration from a court of competent jurisdiction, is a good discharge to him, although the grant be afterwards declared null and void. *Hyman* v. *Gaskins*, 5 Ired. Rep. 267.

Where an administrator manages a suit against himself, in which he is personally interested with the plaintiff, and suffers a judgment to be obtained without the examination of any testimony, such judgment shall not be received as evidence that the debt was due, and that he was bound to discharge it. *Smith* v. *Downey*, 3 Ired. Eq. Rep. 268. A fraudulent donee who has become liable to creditors, as executors *de son tort* of his donor, cannot discharge himself by delivery of the thing given to one who afterwards obtains letters of administration. *Morrison* v. *Smith*, Busb. Rep. 399.

As to the allowance of costs incurred by an executor or administrator, see *Leigh* v. *Lockwood*, 4 Dev. Rep. 577; *Clapp* v. *Cobb*, 1 Dev. & Bat. Eq. Rep. 177. At law, the person named as executor, who propounds a will for probate, will be compelled to pay the costs, if the issue of *devisavit vel non* be found against him. *Little* v. *Lockman*, 5 Jones' Rep. 433. But it would seem, from the present case, that such person might obtain relief in equity, if he could show that he had acted *bona fide* in his attempt to prove the supposed will.

JOHN J. HALES et al. *v.* RICHARD GRIFFIN et Uxor et al.

Where a testator devised and bequeathed all his estate, consisting of land, slaves and perishable property, such as household furniture and live stock, to his wife for life, and then proceeded, "and at the death of my wife, the property then remaining to go to my son A. H. And provided he should be then dead, to

go to his lawful heirs, if any; and provided the said A. H. should die before his mother, and die childless, then the remaining property, after the death of my wife, to be sold, and to be applied" to certain specified purposes; *it was held*, that the wife took but a life-estate in the land and slaves, that the son did not take a vested but only a contingent interest in this property, and that upon the death of the son, in the life-time of his mother, leaving children, the children took such an interest in the slaves as entitled them to apply to a Court of Equity to restrain the tenant for life from selling the slaves out of the State, and to compel her and her vendees to give security for the forthcoming of the slaves at her death.

In a considerable class of cases, a devise or bequest of *what shall remain or be left* at the decease of the prior devisee or legatee, has been held to be void for uncertainty. But where a part of the property comprised in such a gift, consists of household furniture, or other articles of a perishable nature, these words may fairly be considered as referring to the use and wear by the first taker. Such would be the construction, if it were limited to him expressly for life; and indeed there is not any case in which such expressions have been held to render the gift void, where the interest of the first taker was so limited for life.

Daniel Hales made his will, and therein devised and bequeathed as follows: "I give and bequeath to Sarah Hales, my wife, all my estate real and personal, during her life; and at the death of my wife, Sarah Hales, the property then remaining to go to my son, Alexander Hales. And provided he should be then dead, to go to his lawful heirs, if any; and provided the said Alexander Hales should die before his mother, and die childless, or without lawful heirs, then the remaining property, after the death of my wife, Sarah Hales, to be sold, and the money to be applied to maintain worn out travelling Methodist preachers."

The testator's son, Alexander, died in the life-time of
[426] his mother, leaving the plaintiffs, his two children. The testator's estate consisted of land, slaves and perishable property, such as household furniture and live stock. The widow sold to the other defendants several of the slaves; and the bill charged that she threatened to sell others of the slaves to persons who would carry them beyond the limits of the State to parts unknown; so that the plaintiffs would lose all benefit of them. It charged further, that the other defendants intended to send the slaves purchased of the widow out of the jurisdiction of the Court. The bill then prayed for an injunction, and that the defendants should be compelled to give security

for the forthcoming of the slaves upon the death of the tenant for life; and for general relief.

After the filing of the bill, the widow, Sarah Hales, intermarried with Richard Griffin, who was thereupon made a party defendant.

The defendants by their answer insisted that, under a proper construction of the will, the widow had a right to dispose of all or any of the slaves; or such of the other property as should conduce to her comfort and respectability. They denied any intention of removing the slaves beyond the jurisdiction of the Court; and insisted further, that if the clause in the will made a good executory devise of the slaves, the remainder, after the estate for life to the widow, vested in Alexander Hales, and that his personal representative, and not the plaintiffs, would be entitled.

Alexander, for the plaintiff.

D. F. Caldwell, for the defendant.

Daniel, Judge, after stating the case as above, proceeded as follows: In a considerable class of cases, a devise or bequest of *what shall remain or be left*, at the decease of the prior devisee or legatee, has been held to be void for uncertainty. *Bland* v. *Bland*, 2 Cox, 309; *Wynne* v. *Hawkins*, 1 Bro. C. C. 179; *Sprague* v. *Barnard*, 2 Bro. C. C. 585; *Pushman* v. *Filliter*, 3 Ves. 7; *Wilson* v. *Major*, 11 Ves. 205; *Bull* v. *Kingston*, 1 Mer. 314; *Eade* v. *Eade*, 5 Madd. 118. But, it may be remarked, that where a part of the property comprised in such a gift consists of household furniture, or other arti- [427] cles of a perishable nature, (as in this case,) these words may fairly be considered as referring to the use and wear by the first taker. Such, it is clear, would be the construction, if it were limited to him expressly for life. Powell on Devises, 352; (Jarman's note.) Indeed, there is not any case in which such expressions have been held to render the gift void, where the interest of the first taker was so limited for life; and *Cooper* v. *Williams*, Pre. Ch. 71, pl. 64, is an authority against such a construction. We, therefore, are of the opinion that the widow had but a life estate in the slaves.

Secondly; we are of the opinion that the testator's son, Alexander, did not take a vested interest in remainder in this property. The remainder in the land, and the executory devise in the personal property, were contingent, dependent upon the event of Alexander dying before his mother, and leaving children who should survive her. Alexander died in his mother's life-time; he was not entitled to any of the estate, as nothing vested in him. The two plaintiffs (sons of Alexander,) may die before their grand-mother; but if they do not, the whole estate will vest in them on the determination of her life. The context of the will shews that the testator used the words "lawful heirs" of Alexander, as synonymous with the word *children* of Alexander. It says, if Alexander shall die *childless*, then the remaining property, after the death of his wife, shall be sold to maintain the preachers. We therefore think the plaintiff had a right to file this bill.

Upon the evidence, connected with the admitted facts, that the widow has set up a claim to the absolute disposition of the slaves, and has actually sold some of them, this is a proper case in which security should be required for the forthcoming of the negroes, if alive, at the death of the widow, or to abide the future order of the Court. The Clerk of the Court is directed, therefore, to inquire and report as to the value of the said slaves, what security has been already taken, and what further security may be necessary. And the further consideration of the case is reserved.

PER CURIAM. Decree accordingly.

NOTE.—Persons to whom executory and other contingent interests are given, have the same right as vested remaindermen to the protective jurisdiction of the court of equity against those who have the prior estate in possession. *Brown* v. *Wilson*, 6 Ired. Eq. Rep. 558; *Braswell* v. *Morehead*, Busb. Eq. Rep. 26.

As to the construction of the will in the events which occurred, see *Simmons* v. *Gooding*, 5 Ired. Eq. 382; *Roach* v. *Knight*, Busb. Rep. 103; *Mebane* v. *Womack*, 2 Jones' Eq. Rep. 293.

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[428] ALEXANDER PICKARD et al. *v.* THOMAS BREWER.

In a bill by a principal, to have certain conveyances of land and slaves, made by one purporting to act as his attorney, declared void, surrendered and can-

celled, for want of authority in the attorney to act for him, it is unimportant to the defence, whether the plaintiff made to the agent a formal letter or not, provided it sufficiently appear that he otherwise gave him authority to contract in his name for the conveyance of the land and slaves; though such a letter of attorney would be requisite to impart validity to the deeds, as legal instruments.

Any written, or even parol authority, to an agent to make sale of slaves, will be sufficient; because it is an act which may be done without deed, and, therefore, the authority to do it may be without deed.

The fact of an authority having been conferred, and a formal letter of attorney made, by a principal to his agent, for the purpose of submitting certain matters of controversy in relation to land and slaves to arbitration, and making conveyances pursuant to the award, held to be established upon the evidence furnished by the principal's letters and declarations, and by other testimony, contrary to the positive allegations of his bill, and notwithstanding the inability of the defendant to produce the letter of attorney.

The defendant, residing in Orange county in this State, was entitled under the will of his father to certain lands and slaves during his life, and at his death, they were to go in remainder to other persons; of whom the plaintiff, Mrs. Cates, was one. The bill charged that the defendant, Brewer, had purchased the interests of the remaindermen, except Mrs. Cates; and that she and her husband, living in Tennessee, sold and conveyed all her part of the land and slaves to the other plantiff, Alexander Pickard, who resided in Louisiana. The bill was filed in September 1835; and charged that in 1828, after the sale and conveyance to the plaintiff Pickard, the defendant sold, in absolute property, all the said negroes to slave traders, who carried them out of the State; whereby the rights of the remainderman would be defeated, and he disabled from getting the slaves upon the death of the tenant for life. The bill then charged, that the plaintiff Pickard came into North Carolina, just before filing the bill, and applied to Brewer for payment of a reasonable price for his interest in the estates, or for security for the forthcoming of the negroes at the death of Brewer; and was then informed that Brewer set up title to the land and slaves, under an award of certain arbitrators, [429] to whom the controversy had been submitted by the said Brewer and the plaintiff, Alexander Pickard, through and by his attorney, Elijah Pickard, of Orange county, as alleged by the defendant; and that the award had been followed by deeds

of conveyance, in execution thereof, made in the name of the plaintiff Alexander, by the said Elijah, as his attorney; so as to make Brewer, according to those deeds, the sole owner of the land and negroes.

Upon the existence of an authority, conferred by Alexander Pickard on Elijah Pickard, and on the extent of such authority, the whole controversy turned. As to which the bill charged, that the plaintiff never gave any authority to Elijah, to transfer or dispose of his interest in the property; or appointed him an agent in relation to the business. It was admitted, that the plaintiff once contemplated appointing him thereafter his attorney, regularly by letter of attorney and that on the 28th of July 1832, he addressed a letter to Elijah, informing him that he would do so, as soon as he could have the power prepared, after Elijah should, in a reply, communicate his christian name, if any other besides Elijah. It was also admitted, that the plaintiff soon afterwards caused to be forwarded to Elijah, the conveyances from Cates and wife to the plaintiff. The bill then denied that the plaintiff received from Elijah any reply to his letters; and stated, that having been in this uncertainty, until the Spring of the year 1834, the plaintiff then wrote to a gentleman of the bar, of Orange county, (whom he named,) and requested his attention to his interest; and that, in a reply, dated in July following, he learned, to his astonishment, that there had been an arbitration, by which the plaintiff's claim was supposed to be adjusted. The bill then averred, that the plaintiff never did execute a letter of attorney to Elijah, in the premises; and that he did not intend, in and by his letter to Elijah, to appoint him his agent, to transfer, dispose of, or control his interest in the land and slaves, or submit his rights therein to arbitration; and that he at no time intended to confer any powers on Elijah, ex-
[430] cept by the power of attorney, which he had contemplated sending to him, as before mentioned. The bill denied that the plaintiff had received any money under the award, or in any way sanctioned it or acknowledged the agency of Elijah Pickard. The prayer was for a discovery of the names and values of the slaves, and in whose possession, and where they were: that the conveyances obtained from Elijah Pickard might be declared void, surrendered and cancelled; and that the de-

fendant might be required to secure the delivery, at his death, of the proper share of the slaves and their increase, to the plaintiff.

The answer, after admitting the interest of the plaintiff, and the names and sales of the slaves, stated that Elijah Pickard, professing to be the agent of the plaintiff, proposed to sell to the defendant, the plaintiff's interest in the land and slaves; and that, not being able to agree on the price, it was, after the defendant was satisfied of Elijah's authority, agreed between them, to refer the whole subject to the arbitrament of three persons: that as evidence of his agency, Elijah Pickard showed to the defendant a power of attorney from the plaintiff to Elijah, to act for him in selling the land and slaves, or otherwise settling the controversy; and also showed a letter from Alexander to him, of similar import, which created a full belief in the defendant, that Elijah Pickard was really the authorised agent of the plaintiff. The answer further stated, that the articles of submission were drawn by a gentleman of the bar, whom the plaintiff himself, by letter, as well as Elijah, as agent, had engaged to attend to the interests of the plaintiff; and that when the arbitrators met, (which was on the 17th of August 1833,) they inquired whether the said Elijah had authority to act for the plaintiff, and were informed, both by the said Elijah and the counsel, that he had a full power of attorney, which was in the possession of one of them; and that thereupon the arbitrators heard the evidence, the parties and their counsel, and made their written award, that the defendant should pay the plaintiff the sum of $647, at certain days therein mentioned, and that upon such payments being made, proper conveyances should be made to Brewer, "to close all claims between them:" [431] that the defendant accordingly paid the sums as required by the award, and that thereupon the said Elijah, in the name of the plaintiff, executed the deeds to the defendant, to whom also he promised to deliver the power of attorney, though he never did so. The answer admitted that the defendant was unable to produce the letter of attorney; but it insisted, that he ought nevertheless to have the benefit thereof, as it once existed; and that the letters from the plaintiff to the said Elijah did, by themselves, contain a sufficient authority to contract for the sale of the land, and to sell the slaves, although it were insuffi-

cient to enable the agent to execute deeds, and therefore, that the plaintiff could not have any relief in this suit.

To the answer the plaintiff replied, and the parties proceeded to their proofs. The plaintiff took no proof of any material point. On the part of the defendant the articles of submission and the award, dated August 17th 1833, were exhibited and proved; and they appeared to be to the effect stated in the answer; and also the receipts, on the award, of Elijah Pickard, for the sums of money to be paid by the defendant under it.

The defendant did not exhibit a letter of attorney from the plaintiff to Elijah Pickard. But, to establish its existence, he proved and read in evidence three letters from the former to the latter, written from Louisiana. The first was that mentioned in the bill and answer, bearing date July 28th 1832; in which the parts material to this question were as follows: "I have long intended writing to you, but have been waiting until I should get my papers prepared, to appoint you my legal agent to transact that business with Mr. Brewer. I received a letter from Mr. R., saying, that if I would appoint you, you would attend to the same. Shortly after this information, I gave my papers to the parish Judge, who was to make out the power of attorney, send to the Governor and get his seal—all which seemed to be necessary—and return them immediately. He has as yet neglected them. But, as I have just received a letter from D. Turner," (another remainder-man,) "who informs me that he has filed a bill, praying that the
[432] property may be given up, or that we may have security for the same, at Brewer's death, I have thought proper to write you immediately. The original transfer is in Tennessee, where I shall direct it on to you, as you will need it. I shall, as soon as possible, forward you the papers with unlimited power to act, so that you can sell or negotiate as you may think proper; as I am at such a distance, and an imperfect judge of the case, so that I shall leave it entirely with you. Write me immediately on receipt of this, giving me all the information you can. After seeing Mr. Turner, you will know what is the probable expense. Mr. Brewer, when he last wrote me, informed me that, if I would appoint an agent, and they could not agree, he was willing to leave it to referees; and as I am

not disposed to incur cost unnecessarily, and this seems to be a fair way in the general of settling business, I informed him I should accede to his proposition; but of all these matters I leave you to judge, requesting you to settle it in the safest, cheapest and quickest way. I would again say, write immediately, as I think you have a letter in your name that I do not recollect."

The second letter was dated March 6th 1834; and in it the plaintiff thus expressed himself on this subject: "I have waited long and in vain for a letter from you on the subject of my business with Mr. Brewer. I still feel very anxious to have that matter arranged, so that, if Brewer should drop off, I should be secured in the right of my property, or rather in the possession of the same. I have long since requested my friends in Tennessee to forward to you my title papers, which I hope they have done; and if they have, I would be glad you would consult a respectable attorney on the legality of the same, and also with regard to the power of attorney I must give, in order to enable you to prosecute immediately. If I mistake not, I informed you long since, in a letter, that Mr. Brewer wrote to me, if I would appoint an agent, he would settle the matter with him; or, if they could not agree, leave it to disinterested men, and abide their verdict. I would be glad, on the receipt of this, you would proceed without delay; and give me all necessary information, and you shall immediately be empowered to proceed against him."

The third bore date the 20th of November 1834, and [433] was as follows: "Your favor of the 1st of October came duly to hand. I am sorry to add that I am somewhat dissatisfied with the settlement of my business with Mr. Brewer. I am willing he should have ample justice done him, but am unwilling that he should receive two-thirds of my part of the estate. I was willing, and am still willing, to give him up the land, if he would give me up the negroes; all of which I have no doubt he can produce, except the oldest boy.

"In this matter, I wish to be understood. If your compromise has been legal, I have nothing more to say on the subject. You state you have no doubt all my money would be ready when called for; and that $400 was due last fall, and the balance this.

"On the receipt of this, I would be glad you would inform yourself of these facts, as well as see Mr. N., (the counsel,) whom I shall address by this mail; and then inform me of the result. Had my business been satisfactorily settled, I should have visited Orange again."

The defendant also examined as witnesses Elijah Pickard, the counsel who was employed to conduct the business, and one of the arbitrators.

Mr. Pickard stated that, besides the letters already set forth, he received from the plaintiff at least two others on the subject of this controversy. Being asked whether he ever received the papers mentioned in the letters produced, and whether he was by such papers constituted the plaintiff's attorney in said matter? he replied that he did receive papers, which he believed to be those spoken of; and that, upon receiving them from the plaintiff, he referred them to the counsel spoken of, to know if they were competent to make him the legal attorney of Alexander Pickard; and was by him informed that they did. Being asked whether he delivered those papers to the defendant, or knew where the other letters were? he replied that he did not deliver them to the defendant, and that he did not know where they were, except that he was informed by his family, that when the plaintiff came into Orange, he had access to all the papers of the witness, during his absence
[434] from home; and that shortly afterwards the plaintiff himself informed the witness that he got all the letters he had written him on said controversy, and had left them with a person in the neighborhood. The witness stated further, that on the arbitration, his authority was inquired for; and that the counsel replied that he was properly authorised to act; and the witness so believed himself to be.

The arbitrator stated that he could not distinctly recollect that the arbitrators asked respecting the authority of Elijah Pickard to represent the plaintiff; but he thought they did.

The professional gentleman stated that in 1833 he received a letter from the plaintiff, desiring him to act as his counsel in managing the claim against Brewer; and the plaintiff therein referred him to Elijah Pickard, whom, he said, he had appointed his agent, with full authority to settle the business, either by

suit, arbitration or otherwise. He was about filing a bill in Equity, when Elijah, the agent, informed him that he and the defendant had agreed to submit the matters to three arbitrators; that the witness thereupon drew the submission and attended on behalf of the plaintiff before the arbitrators; who, after a full and fair investigation, made the award. He immediately wrote to the plaintiff the result. The witness afterwards received from the plaintiff another letter on the subject, in which he took no notice of witness's letter to him, although there was time for it to have arrived before the plaintiff last wrote; and in consequence thereof, the witness again communicated to the plaintiff what had been done.

He further stated, that at the time of the arbitration, he was satisfied that Elijah Pickard had a regular and sufficient power of attorney from Alexander Pickard, to settle the business by arbitration; and that he was unable to account to himself how he could have suffered the business to be transacted, unless he had seen and examined it. Yet he stated that he could not, at the time of his examination, recollect that he ever saw such a paper; nor that an inquiry was made of him for it by the arbitrators. He further stated, that about the time the bill in this case was filed, the plaintiff applied to the witness to rip up the settlement. The witness informed him that he must get somebody else to do it; for that the settlement was [435] made by the plaintiff's authority and direction, and the trial was fair and impartial, and the witness had been instrumental in making the settlement, and could have no hand in undoing it; and that to those remarks the plaintiff replied, "that it was true he had authorised the settlement; and that he would have been perfectly satisfied with it, if the arbitrators had allowed a reasonable price for the negroes."

The witness finally stated, that he had made a thorough search amongst his papers for the letters between him and the plaintiff, and had been unable to find them.

W. A. Graham, for the plaintiff.

Badger and *Waddell*, for the defendant.

Ruffin, Chief Justice, after stating the pleadings and proofs

as above, proceeded as follows: For the purposes of the present suit, it is unimportant whether the plaintiff made to his agent, Elijah Pickard, a formal letter of attorney or not, provided it sufficiently appear that he otherwise gave him authority to contract in his name for the conveyance of the plaintiff's interests in the land and slaves, or to submit the controversy to arbitration. To the deeds made to the defendant, a letter of attorney would be requisite to impart validity as legal instruments; and if the plaintiff were proceeding at law, there might be more difficulty in substantiating the defence. But the equity of the bill is fully answered by any written or even parol authority to make sale of the slaves; because that is an act which may be done without deed; and therefore the authority to do it may be conferred without deed.

The plaintiff's letters, which remain and have been proved in the cause, create in themselves the competent power to do every thing but execute conveyances. It is a quibble on the terms found in parts of the letter of July 1832, to say, as the bill does, that the plaintiff did not thereby confer any authority, but only expressed an intention to do so *in futuro*. The meaning, on the other hand, is plain enough, that he thereby appointed Elijah Pickard his agent, as far as it could be
[436] done by letter; but that he had intended, and did then intend, to make that appointment in a manner the most formal, as soon as he could have the instrument prepared, whereby the agent would have power to do every thing which his principal might; that is to say, fully complete, as well as enter into, an agreement. The very object of writing at that time, requires this construction of the letter. Why did the plaintiff write "immediately"? To let the other know that his purpose was to appoint him his attorney? Certainly not; for he says that a friend had informed him that the other would attend to the business as his agent; and moreover, he had his title papers sent to him forthwith. Then, the plaintiff wrote at that time, that he might have an agent upon the spot ready to act immediately for the preservation of his rights, to whom, for the purpose of meeting formal objections from the other side, he would remit an indisputable commission, delegating "unlimited power" in express terms. But the agent was not to

await the arrival of that instrument before doing any thing; for, besides similar expressions elsewhere, the letter, after mentioning the plaintiff's acceding to Brewer's proposition for a reference, adds, "but of all these matters *I leave* you to judge, *requesting* you *to settle* it in the safest, cheapest, and *quickest way*." These words import a present, and not a future purpose to constitute the agent; and that too, with the view of a cheap and expeditious adjustment, instead of the more dilatory and expensive remedy by litigation.

But the Court is satisfied, from the evidence, that the power of attorney, on the want of which the bill so much insists, was in fact executed and sent by the plaintiff. Why should it not have been? It is pretended that the plaintiff was not certain of the agent's name. But that cannot account for his waiting two years without further inquiry, and when he seems to have been so anxious about his rights, and so fearful of the loss of the slaves. In the next of the letters filed, there is no intimation that he had been prevented by that cause from sending the power; nor that he had not received a reply to his first letter, accepting the proffered agency. It purports indeed to be written by one who was ignorant of what had been done in the business; and might have been designedly thus [437] written, after the plaintiff had received the advices from his agent and counsel, which they gave him. But, the strong and conclusive circumstances are, that the agent swears that, besides those letters, he received two others at least, and under cover of them, papers, among which purported to be a power of attorney, which, when by him submitted to the respectable counsel employed by him, he was advised was a regular and sufficient power; and the counsel also swears that, although he cannot now remember examining or seeing such a paper, he was, at the time of transacting the business, satisfied that the agent had such authority; and he is sure that, if there had not been such an authority, he could not have suffered it to go on. Now, when to that testimony are added the facts, that the plaintiff had access to the agent's papers in his absence, and by his own admission took away some of the letters which he wrote, and still retains them; and that the letters thus suppressed are those which, according to the course of the corres-

pondence, would have enclosed the letter of attorney and particularly mentioned it, we are furnished with grounds of the strongest presumption against the plaintiff. That presumption is greatly fortified by other parts of the correspondence and the declarations of the plaintiff. In his first letter to his counsel, he stated that "he *had* appointed Elijah Pickard his agent, with *full* authority to settle the business by suit, arbitration, or otherwise." In the letter of the 20th November 1834, in which he first admits the receipt of advice of the settlement, he firmly expresses his dissatisfaction therewith, and his wish to get rid of it; but he does not intimate a want of authority in those who acted for him, as a ground for doing so. On the contrary, he admits himself to be bound by the award, provided the arbitrators were sworn, and otherwise proceeded in the way which he supposed to be legal. Again: just before he commenced this litigation, the plaintiff explicitly admitted to the same counsel that he, the plaintiff, *had authorised* the settlement; and stated his objection to be to the sum allowed, and not to the want of authority. It may be safely assumed, we think, that this admission never would have been retracted, [438] but for the opportunity the plaintiff probably afterwards had, and used, for preventing the agency of Elijah Pickard being established by the production of the instrument which conferred it. At all events, the circumstances are of a character which compel the Court to conclude, that the plaintiff, by his deed and letter of attorney, in 1832, appointed Elijah Pickard his agent, with authority to do the several acts alleged in the pleadings to have been done by him, in the name of the plaintiff. The bill must, therefore, be dismissed with costs.

PER CURIAM. Bill dismissed.

NOTE.—Where one person authorised another to buy and sell negroes for him, that was a general authority, and the agent had a right to buy for cash or on credit, at his discretion, and the agent would be bound by his act. *Ruffin* v. *Mebane*, 6 Ired. Eq. Rep. 507.

REBECCA UTLEY et al. *v.* BURWELL RAWLINS et al., Adm'rs of WILLIAM UTLEY.

It is not generally the duty of an administrator to volunteer in paying debts which his intestate has contracted as surety, and procuring assignments thereof to a trustee; and if, in pursuing this unusual mode of administration, he should happen to injure the estate committed to his charge, he would be obliged to show very special and sufficient reasons for his conduct, before he could exonerate himself; and therefore he cannot ordinarily be charged with a want of due diligence in prosecuting a claim against his intestate's principal, in not pursuing such a course.

Where an administrator has fully administered all the assets of an estate, in his hands, he cannot be charged for not prosecuting a doubtful claim at his own costs, when the next of kin refused to incur the liability of costs.

The court will not direct an inquiry as to matters not put distinctly in issue by the pleadings, and with regard to which there are no proofs.

The bill, in this case, was filed by the next of kin of William Utley, against his administrators, for an account. Upon the hearing, it was agreed between the counsel, that the defendants had fully accounted with the plaintiffs, unless they were chargeable for a breach of duty in not having used due diligence to recover a sum of money for which their intestate had made himself liable, as surety, on a bond of John A. Ramsay; and which the defendants had paid out of the [439] assets of their intestate. It appeared that Ramsay died in September 1821, and Philip Alston was appointed administrator of said Ramsay's estate, in November 1821. Shortly thereafter, suit was brought against Alston, the administrator of Ramsay, these defendants, as administrators of Utley, and Thomas Hill, also a surety on the bond, by the obligee, Conrad Staley; and at August Term 1823, judgment was obtained thereon; but with a finding that Alston had fully administered. Staley took out execution, and levied it on the goods of Utley, in the hands of the defendants; and made thereout full satisfaction of his judgment. Hill was insolvent, and every effort on the part of the defendants to procure contribution from him, proved unavailing. No suit was brought by the defendants, to recover from Ramsay's estate the money so paid by them as administrators. One of the plaintiffs, in her own behalf and

as guardian for the other plaintiffs, did cause an action to be instituted, in the name of the defendants, against the administrator of Ramsay, in November 1825. After this action had been pending some time, a rule was obtained by the defendant, requiring that the plaintiffs should give security for prosecuting the suit, or that the same should be dismissed. The defendants proffered to the plaintiff who had caused the action to be brought, to give the security required, upon being indemnified from the costs. This offer was not accepted; the security was not given; and, under the rule, the suit was dismissed.

The defendants, in answer to the charge of neglect, said, that when Staley's judgment was obtained against them, it had been ascertained that the estate of Ramsay was utterly insolvent, and that any attempts on their part to effect the recovery of the money paid in satisfaction of this judgment, would but run the estate of their intestate to costs, without the least prospect of benefit to it.

W. H. Haywood, for the plaintiffs.

Badger, for the defendants.

Gaston, Judge, after stating the case as above, proceeded as follows: We do not deem it necessary to examine very [440] particularly the testimony by which these allegations are supported, as the parties do not so much disagree respecting facts, as they do upon the principles applicable to them. It is not questioned, but that at the time the judgment was rendered against the defendants, all the assets in the hands of the administrator of Ramsay were exhausted. It is also manifest upon the proofs, that before that time judgments had been signed by creditors, with a finding that the administrator of Ramsay had fully administered, for an amount exceeding the value of all the real estate, and *sci. fas.* had issued to subject that real estate to the satisfaction thereof. It appears, also, that after these *sci. fas.* had issued, on the petition of the guardian of the heirs, the County Court made an order for selling the real estate on credit; that it was sold accordingly, and all the proceeds distributed rateably among those who had so issued

their *sci. fas.*, and proved insufficient, by a large sum, to pay the amount of their judgments.

On the part of the plaintiffs, it is by their bill insisted, that the defendants are chargeable, because they *might*, by paying off Staley's demand before suit, or immediately after suit, and taking an assignment thereof to a trustee, have pushed the claim *pari passu* with the most diligent and successful creditors of Ramsay, and have either obtained a judgment against the administrator before he had legally discharged himself of the personal assets, or, at all events, have come in for a share in the distribution of the real assets. It is *possible* that this course of proceeding might have been advantageous for the plaintiffs, and if it had been shown that it was one which was obviously required by a regard for their interests, and which the defendants had the means of pursuing, the omission to take it might have been pressed with much force, as a defect of diligence. Certainly, however, it is not generally the duty of an administrator to volunteer in paying debts which his intestate has contracted as surety, and procuring assignments thereof to a trustee; and if in pursuing this unusual mode of administration, he should happen to injure the estate committed to his charge, he would be obliged to show very special and sufficient reasons for his conduct, before he could exonerate himself. It is not pretended that this course was intimated or recommend- [441] ed, or even known to the defendants. It is not shown that they had reason to believe that the claim in their hands could be pushed with more celerity than it was by Staley. And it is not shown that they had any assets wherewith to make the purchase, other than the negroes of the estate; and if they had *sold these* to raise money wherewith to buy up the claim, and loss had been incurred, they could scarcely have saved themselves from a strict accountability therefor. A trustee owes perfect integrity and reasonable diligence to his *cestui que trusts*. There is not the slightest ground to attribute unfairness of purpose to these defendants; and if there has been any error on their part, it is not such as indicates the want of ordinary prudence. After the result of any course is ascertained, it may be easy to see how it might have been avoided by some different mode of procedure; but, in judging of the *prudence* of the course

pursued, it is proper to throw out of consideration our knowledge of what was its result.

The next ground taken in the bill for charging these defendants is, because they declined to prosecute the suit against Ramsay's administrator. We are entirely satisfied that this ground is not tenable. It is certain that the administrator had no assets; and the defendants would have been obliged, if they prosecuted the suit, to carry it on at their own costs. The estate had then been settled; they had nothing of it in their hands; and if those beneficially interested would not incur the liability of costs, it is against conscience that they should require the claim to be conducted for their benefit at the expense of the defendants.

Some other grounds have been taken by the plaintiffs counsel, in argument, which were not put distinctly in issue by the pleadings, and with regard to which there are no proofs. They have prayed for that purpose an inquiry. We do not think—without some evidence rendering the matter alleged at least probable—that we should be justified in directing the inquiry asked for.

[442] It is the opinion of the Court that the bill must be dismissed, but not with costs.

PER CURIAM. Bill dismissed.

NOTE.—As to the principle upon which executors and administrators will be held responsible, it seems to be settled that they will be held to be liable only for want of good faith and reasonable diligence. *Williams* v. *Maitland*, 1 Ired. Eq. Rep. 92; *Ball* v. *Darden*, 4 Ired. Eq. Rep. 76; *Holderness* v. *Palmer*, 4 Jones' Eq. Rep. 107; *Deberry* v. *Ivey*, 2 Jones' Eq. Rep. 370. An administrator, in this State, cannot by virtue of his appointment here, collect the assets of his intestate in another State, and is not under any legal obligation to procure administration out of the State. *Plummer* v. *Brandon*, 5 Ired. Eq. Rep. 190; *Governor* v. *Williams*, 3 Ired. Rep. 153; *McBride* v. *Choate*, 2 Ired. Eq. Rep. 610; *Sanders* v. *Jones*, 8 Ired. Eq. Rep. 246.

ATTILIA WHITTED et al. *v.* JAMES WEBB et al., Ex'rs of JAMES WHITTED.

An executor of a deceased partner, who has generally exhibited perfect integrity and zeal in the management of his testator's estate, shall not be charged with negligence in not filing a bill for an account and settlement against the surviving partner within two years after the expiration of the partnership, and until after the surviving partner had left the State, where it appears that the

latter had been greatly trusted by the testator himself, was a man of unexceptionable character, and up to the time of his going away, was actively engaged in winding up the affairs of the concern, and no suspicion was entertained by any person of his integrity during that period.

In a bill for an account by the legatees against the executor of a deceased partner, in which they seek to charge him for not collecting the amounts of certain decrees which he had obtained against the surviving partner, upon a bill taken *pro confesso* against him, if it appear that the decrees were erroneous, and the sums decreed therein too large, and the executor has in fact obtained from the surviving partner as much, or more than the amount properly due from him, the executor shall not be charged with the balance remaining unpaid on the decrees, and which cannot now be collected because of the insolvency of such surviving partner.

If an executor make a compromise for the estate of his testator, which is, as a whole, highly advantageous to it, he shall not be charged because, in a single particular, it is not so; for, being advantageous upon the whole, the estate must take it with its inconveniences as well as its benefits.

An executor is entitled to charge for actual expenditures incurred in the faithful discharge of his duty; and the expenses of attending sales in which the estate is interested, and of sending an agent out of the State to collect a debt of considerable amount, are of that character.

The Court will not disturb the commissions allowed an executor by the Master, though they were in part allowed on some items not the proper subjects of a commission, if the Master has reported the whole sum allowed for commissions to be reasonable, and, excluding from the account every [443] item not properly the subject of a commission, the gross amount allowed will not exceed 5 per cent. on one side of the account.

A commissioner, by reporting an account annexed to the defendant's answer to be correct, adopts it as *his* account.

Where claims against a partnership appear to have been unsatisfied at the death of one of the partners, the exhibition of the vouchers of payment by his executor, in a suit by the legatees against him, is *prima facie* evidence that he made the payment; though the mere production of the testator's notes by an executor does not establish payment by him, where it does not appear that the notes were unsatisfied at the testator's death.

In a bill by the legatees against the executor of a deceased partner, it is immaterial whether the partnership debts were paid by the executor of the surviving partner. They were charges upon the assets, and the plaintiffs are entitled only to the clear residue of these assets, after payment of the charges upon them.

The Court will not disturb the Master's allowance of commissions, because he has not allowed any on the disbursements, if it is satisfied with the *amount* allowed as a compensation for the executor's services.

James Whitted, late of Orange county, died in March 1817, having previously duly executed his last will, which, at the May Term following of the County Court of that county, was

admitted to probate, and the executors therein named, James Webb and Frederick Nash, qualified accordingly. The last named executor, however, never took into his possession any of the assets of the testator, and the administration of the estate was managed solely by the other executor, James Webb. By his will, the testator, with the exception of one specific legacy, in favor of his widow, directed his estate to be sold, and the proceeds thereof to be equally divided between his said widow and his two infant children. At May Term 1822, of Orange County Court, the executor, James Webb, having returned an account of his administration, and desiring that there should be a settlement made thereof, under the sanction of the court, a petition was filed in the names of the widow and children against the said Webb, and a decree rendered thereon, which affirmed the said account *in toto*. Payments were immediately made of the balance so found due, and the settlement was treated by all the parties interested, as a final settlement, until the year 1829, when the widow and children, alleging
[444] that the decree was made *in form* only on an adversary proceeding, but was, in *effect*, a decree *ex parte*, instituted a suit by petition for a settlement of the estate. This petition, after having pended a considerable time, was dismissed in this court, because of defects appearing on its face; but without prejudice to the rights of the petitioners, to prefer a new petition or bill, on account of the same matters. Thereupon, this bill was filed by the widow and children against the defendants, for a general account and settlement of the estate; and the defendant, Webb, having waived any legal advantage, if any he had, under the decree of 1822, an account was ordered as prayed for. The commissioner made his report, to which exceptions were taken by both parties; and the cause was heard upon those exceptions.

The principal matters in controversy between the parties related to the conduct of the executor, Webb, in his transactions with the surviving partners of a mercantile concern, in which his testator was interested at the time of his death. In November 1815, the testator formed a partnership with Chesley L. Fawcett and Joseph Dickey, upon the terms that the testator had advanced, as his part of the capital stock, the sum of $4000,

in goods then on hand, and Fawcett and Dickey should advance $1000 each; that the business should be carried on on Stoney Creek, in Orange county, by Fawcett, under the name and style of Chesley Fawcett & Co.; and at Bruce's Cross Roads, in Guilford County, by Dickey, under the name of Joseph Dickey & Co.; and that the profits of the partnership should be divided among the partners, one half to Whitted, and one-fourth to each of the others. In April 1817, Fawcett and Dickey respectively sold, at public sale, the goods of the firm, at the different establishments whereof they had the management. These sales were attended by the defendant; and for the purpose of preventing an injurious sacrifice, and after consultation with William Whitted, a gentleman of much experience and sound judgment, and the father of defendant's testator, the defendant made an arrangement with Dickey to purchase such of the goods as they believed were not likely otherwise to command a fair price; and they accordingly bought, in the name of Dickey, at Fawcett's sale, to the amount of $1,490 48, and at Dickey's sale, to the amount of [445] $1,105 16. Upon these purchases the defendant and Dickey sustained a considerable loss. Fawcett and Dickey from time to time made collections and applied sums of money in satisfaction of the demands of the creditors of the firm, principally through the defendant. The defendant, becoming dissatisfied with the delay of Fawcett and Dickey, in closing the affairs of the partnership, filed a bill against them at the March term 1819, of the Court of Equity for Orange county, charging them with neglect of duty in collecting, and misapplication of the partnership funds, praying for a full settlement, and for the appointment of a receiver. At the September term 1819, it was ordered by the Court that the books and accounts of Fawcett & Co. be delivered over to Thomas Clancy; that Joseph Allison be appointed receiver and collector; and that Thomas Clancy take an account of all moneys received and paid over by Fawcett. Dickey, at the time this bill was filed, was out of the State, and never afterwards returned thereto. As against him the bill was, at September term 1819, taken *pro confesso*, and an account ordered. Fawcett and the present defendant entered into a compromise, in pursuance of which, a de-

cree was entered up against Fawcett, at the September term 1820, whereby the said Fawcett was decreed to pay to the executors of Whitted the sum of $715, in certain instalments, but with interest from the 20th September 1820; and to transfer to them, for the benefit of the estate of their testator, the amount due from Dickey for purchases at Fawcett's sale, then amounting, with interest, to the sum of $1,728 96; that Fawcett should indemnify the estate of Whitted from all claims of the creditors of Fawcett & Co.; that he should pay all the costs of the suit; and that thereupon the books and papers of Fawcett & Co. should be re-delivered to him. With this decree Fawcett fully complied. At the same term it was decreed that Dickey should pay to the executors of Whitted forthwith, the said sum of $1,728 96, with interest thereon from the said 20th September 1820; that the cause be retained for further proceedings against Dickey on account of his transactions for Joseph
[446] Dickey & Co.; and the commissioner was again directed to state an account thereof, and report to the next term. At the succeeding term, the commissioner made a report in relation to that part of the suit which involved the accounts of Joseph Dickey & Co. In that report, he estimated that this branch of the concern, besides being able to refund to the partners all the capital invested, with interest thereon, had made an extra profit of $1,055 09. He therefore found Dickey in debt to the executors of Whitted in the sum of $2,450, being his share of capital advanced and interest thereon from the date of the advance, and also in the further sum of $527 54, said Whitted's share of the said profits: whereupon it was decreed that Dickey should pay the executors of Whitted, in addition to the sum decreed at the former term, the further sum of $2,977 54. Thus the amount of the two decrees against Dickey was $4,706 50. The defendant, unable to get satisfaction of this decree in North Carolina, caused Dickey to be arrested by some process which he sued out against him in the State of Maryland, and succeeded in coercing from him the sum of about $3,000. The residue of the decree remained unsatisfied, and Dickey afterwards died insolvent.

W. A. Graham, for the plaintiffs.

Badger, for the defendant.

Gaston, Judge, after stating the case as above, proceeded as follows: Many serious charges made in the bill, have been completely abandoned. There is no dispute but that the conduct of the defendant, in the arrangement he made for buying at the sales, was prompted by honest motives, and resulted in a real benefit to the estate under his care. It is also admitted, that the compromise made with Fawcett was a highly advantageous one for the estate. He thereby obtained more than a reimbursement of the principal and interest of the capital invested by Whitted, when it is proved that the concern did a losing business, and sunk a part of the capital. The important matter in controversy is, whether the defendant is not liable, in whole or in part, for the uncollected balance of the decree against Dickey. This question is raised in different forms upon [447] the second, fifth and sixth of the exceptions taken by the plaintiffs to the report.

The plaintiffs insist, in the first place, that here is a clear loss sustained by the estate, by reason of the culpable negligence and misplaced confidence of the defendant. Joseph Dickey was a man of slender means, and proved himself incapable, or unfaithful, in settling the affairs of that part of the mercantile concern wherewith he was charged. The defendant took no measures to bring him to an account as managing partner, until two years after the expiration of the partnership, and after he had left the State, so as to be beyond the reach of the process of our Courts. And it is therefore just, that this loss should fall on the negligent trustee, and not upon his innocent *cestui que trusts*. In examining this charge, it is proper to bear in mind, the perfect integrity and zeal for the interest of those whom he represented, which have generally marked the conduct of the defendant, in the execution of his trust. His efforts to save the estate from loss, in the sales made by the surviving partners, and which actually resulted in loss to himself, are evidences of this zeal. It is in proof, too, that throughout the whole of his administration, he habitually consulted with, and acted under, the counsel of the best friend of the family, and a friend characterized by great sagacity. We can have scarcely then a rea-

son to doubt, but that the defendant meant to discharge his duty faithfully, and that if he erred, it was an error of judgment. Was it a culpable error? Dickey had enjoyed so fully the confidence of his testator, as not only to be taken into partnership, but to be entrusted with the *sole* management of the affairs of the firm that were to be conducted out of the county. All the evidence concurs in establishing that he was a young man of fair character. He was the one selected both by Webb and the elder Mr. Whitted, to unite with the defendant in the plan of defensive operations against Fawcett. The goods were sold on a credit, which expired 1st January 1818. Between the day of sale and the time when Dickey went away, which was in the summer or fall of that same year, he did not remain inactive—paying no attention to the winding up of the affairs un-
[448] der his charge. We cannot ascertain, with certainty, the amount; but from the statements accompanying the report, in the suit against him, during that period nearly $3,000 appear to have passed through him to the present defendant, towards the discharge of the demands against the firm. Not a single witness has testified that there was any suspicion entertained of his integrity, up to this time. What ground had the executor then for filing a bill against him? If he had filed a bill, what pretence could he have alleged—and the allegation should be on oath—for appointing a receiver, and depriving Dickey of his legal rights, as a surviving and managing partner? We acquit the defendant of this charge of culpable neglect.

It is next insisted, that the money collected from Dickey ought to be applied to the satisfaction of the second decree made against him, and that the defendant is personally liable for the $1,728 96, first decreed against Dickey. In support of this proposition, it is said that Dickey and the defendant were joint purchasers at Fawcett's sale, to the amount of $1,490 48; that this sum, with interest from the 1st of January 1818, to the date of the decree, amounted to $1,728 96; and that the transfer and assignment to the executors of a debt, personally due from one of the executors, is so much assets of the estate in his hands. Admitting the correctness of the argument, we yet see that, in the account, the *defendant is charged with this sum.* He is debited for the amount received on compromise with Fawcett,

$2,443 96, which includes the transfer of this claim as *so much cash*, $1,728 96, and the cash actually paid by Fawcett, $715. The estate, therefore, is actually credited, and the defendant debited, with this sum. The obscurity and perplexity attending the investigation of this case, seem mainly to arise from what appears to us an error against Dickey in the first decree, charging Dickey with the amount of those purchases. It appears clearly, from the exhibits therein, that Dickey, in his transactions with the present defendant, had fully accounted for what he personally owed for those purchases, as well as for the purchases made at his own sale, and was somewhat in advance beside. Properly, therefore, is the defendant [449] charged in *this* account for both these purchases—the former $1,728 96, and the latter $1,105 16. But why should Dickey have been charged in the former suit with the amount of the purchases at Fawcett's sale as an existing debt transferred from Fawcett to Whitted's executors? It was in truth extinguished, and the sum with which Dickey ought to have been charged was the balance, whatever it might be, due from him as managing partner of Joseph Dickey and Co., to Whitted's executors, for advances made by them to discharge the debts of Joseph Dickey & Co., above the payments which they had received from him. What was this balance does not distinctly appear; but it is manifest that it fell short of the amount thus improperly debited to Dickey. It is quite apparent that this is not the only error injurious to Dickey to be found in the proceedings against him. In the account on which the second decree is founded, the amount of debts due Joseph Dickey & Co. is set down, as "taken from the list of balances," at $6,654 47; whereas it will be seen from the exhibit in the cause, that the amount of debts in that list of balances is $6,359 37; that to *this* was to be added $137 60, because of balances overlooked; making the amount $6,496 97, and $20 cash, which would raise the whole to $6,516 97; but the commissioner, by mistake, added the $137 60 and the $20, not to the $6,359 37, but to the $6,496 97; thus in effect charging him with $137 60 *twice*. Moreover, in that account Dickey is charged in account with Whitted's executors with the full amount of capital put in by their testator in goods, and with interest thereon, and $527 54, their tes-

tator's share of profits. Now, there cannot be a question, upon Fawcett's testimony, that the business was a *losing one*, and that upon a fair settlement with Dickey, Whitted's estate would not have received the *principal* advanced, much less principal, interest and profits. Fawcett declares that the compromise which he made with respect to the claim against himself was, speaking in a business sense, "the worst act of his life," whereby he sunk from $500 to $1,000; that the share of capital advanced by Mr. Whitted was in old goods, and at a time
[450] when the price of goods was rapidly declining, and continued to decline until after Mr. Whitted's death; that the branch of the concern under his management had a large number of bad debts; and that he verily believes the business of Joseph Dickey & Co. was also a losing business, both from his knowledge of it at the time of Whitted's death, and from the enquiries made by him about it afterwards. It may be remarked, that it was probable that Fawcett would take care to be well informed on the subject, as he was a partner in the concern, and entitled to a share in the profits thereof, if, in truth, profits had been made. Nor is it strange that in taking an account of the dealings of a partnership, against the managing partner, without the attendance of himself or any agent on his behalf, in the presence of those whose duty it was to press against him every claim apparently well founded, and in the absence of all vouchers for his discharge, the most conscientious commissioner should report an amount due much beyond the truth—as we hold was unquestionably the case in that suit. The loss which the plaintiffs complain of, by reason of a large part of the decree against Dickey remaining unpaid, is more apparent than real. Indeed, we greatly doubt, if a bill had been filed before Dickey went away, and the accounts of both branches of the co-partnership had been accurately taken, whether Mr. Whitted's estate would have had a decree against both the surviving partners for as much as has been actually realized for the estate from them.

It was also objected by the plaintiffs, in relation to this part of the case, that the defendant had acted culpably in discharging Fawcett, by the compromise, from liability to contribution because of Dickey's defalcation. We think this objection unfounded. It is admitted on all hands that the compromise was

one highly advantageous to the estate; and the estate must take it with its inconveniences as well as its benefits.

The Court therefore overrules the 2d, 5th and 6th exceptions of the plaintiffs.

The first exception is also overruled; for it seems to us that the commissioner, by reporting that the account A, annexed to the defendant's answer, is correct, adopted that [451] as *his* account.

The Court allows the third exception in part, that is to say, as to the sum of $14, with which it holds that the defendant has been improperly credited for personal services. The residue of the exception is overruled. The defendant is entitled to charge for actual expenditures incurred in the faithful discharge of his duty. The Court holds those of attending the sales and employing Watts to have Dickey arrested, to be expenditures of that character. Some of the items on which commissions have been calculated, are not indeed the proper subjects of a commission; but the Court will not disturb the report on that account; for the commissioner hath reported the *whole* sum allowed for commissions to be reasonable; and excluding from the account every item not properly the subject of a commission, the gross amount allowed will not exceed 5 per cent. on one side of the account.

The 4th exception is also overruled. There is satisfactory evidence that the demands paid off against the concern of Joseph Dickey & Co., were *bona fide* demands, existing at the death of Mr. Whitted. In the exhibits of the former equity suit, it will be seen that Fawcett and Dickey, upon the death of Whitted, inventoried the debts due to, and those owing from, their concerns respectively. In that of Dickey's these are found. Besides, in regard to every one of them, there is particular evidence, either conclusive *per se*, or corroboratory of that furnished by the inventory. It is seldom, indeed, that such old transactions can be proved as clearly as these have been. But it is objected that it does not appear that they have been paid by the present defendant; and furthermore, that in the account on which the last decree against Dickey was founded *he* is credited with the amount of these demands as having been paid by him. This last observation is founded on a mis-

apprehension of the account to which it refers. To enable the commissioner to ascertain what was due from Dickey as the managing partner of the firm of Joseph Dickey & Co., it was necessary to take the accounts of the firm; and in doing this, he is charged with all its effects, and is credited with all
[452] its debts, whether paid or to be paid. The exhibition of the vouchers of payment by the defendant is *prima facie* evidence that he made the payment. The decision in *Finch* v. *Ragland*, 2 Dev. Eq. Rep. 142, that the production of the testator's notes by an executor does not establish payment by the executor, applies where it does not appear that *these* were unsatisfied at the testator's death. But, in truth, it is of little moment to the plaintiffs by whom, whether by Dickey or by the defendants, these demands were paid. They were charges upon the assets; and the plaintiffs are entitled only to the clear residue of these assets, after payment of the charges upon them.

The defendant has filed one exception, for that the commissioner has not allowed a commission also on the disbursements. The Court overrules that exception, because it is satisfied with the *amount* allowed as a compensation for defendant's services.

The account returned will be modified according to this opinion, and a decree rendered for the plaintiffs for the balance that will be then due. The costs of taking the account are to be paid equally by the parties; and as to the other costs, the parties will respectively pay their own. The commissioner is allowed $25 for his report.

PER CURIAM. Decree accordingly.

NOTE.—As to the responsibility of an executor or administrator in accounting with those who are entitled to the estate, see the cases referred to in the note to the case of *Utley* v. *Rawlins*, *ante* 438, and also *Hobbs* v. *Craige*, 1 Ired. Rep. 332; *Jones* v. *Loftin*, 3 Ired. Eq. 136.

Though an executor or administrator will be allowed his actual expenditures, including reasonable counsel fees, (*Hester* v. *Hester*, 3 Ired. Eq. Rep. 9,) yet he cannot charge any thing beyond his commissions for personal services. *Morris* v. *Morris*, 1 Jones' Eq. Rep. 326.

On the question of commissions, see *Peyton* v. *Smith*, *ante* 155, and the note thereto on that subject.

ALONZO P. SESSOMS et al. *v.* ELISHA SESSOMS, Ex'r of CELIA FREEMAN et al. [453]

Where a testator, after giving several pecuniary legacies in "dollars," proceeded as follows: "Item, I likewise leave all my lands and plantation to be sold by my executors, and pay five hundred to my brother N S's children, to be equally divided; to them and their heirs forever. Item, I give and bequeath E. S. one thousand dollars, to him and his heirs forever. Item, and also all the residue of my estate to be sold by my executors, and all my just debts to be paid—those legacies to be paid off which I have already given away, and the balance, if any, to be equally divided between E. S." and others: *It was held*, that the word "five hundred" meant five hundred dollars, and was a legacy of that sum to the children of N. S.; and that the legacy was a general one.

The plaintiffs, who were the children of Nathan Sessoms, filed their bill to recover a legacy of $500, which they alleged that they were entitled to receive under the will of Celia Freeman. The objections on the part of the defendants were, first, that no such legacy was given by the will. But, secondly, that if there were such a legacy, it was a specific legacy, or a legacy payable out of the land only; and that the fund out of which it was intended to be raised had failed, in consequence of the will's having been attested by one witness only: that the power intended to be given to the executors, to sell the land, and pay the $500 out of the proceeds, was not good in law, for the want of two witnesses to the will. Celia Freeman, the testatrix, in the first and second pages of her will, gave several specific and pecuniary legacies. The sums in all the money legacies, were mentioned in *dollars*. Then came the following clauses: "Item, I likewise leave all my lands and plantation to be sold by my executors, but one acre to include graves, and pay five hundred to my brother Nathan Sessoms's children, to be equally divided, to them and their heirs forever. Item, I give and bequeath Elisha Sessoms the sum of $1000, to him and his heirs forever. Item, and also the residue of my estate to be sold by my executors, and all my just debts to be paid—those legacies to be paid off, which I have already given away; and the balance, if any, to be equally divided between Elisha [454] Sessoms" and others.

A. Moore, for the plaintiffs.

Iredell, for the defendants.

DANIEL, Judge, after stating the case as above, proceeded as follows: In the construction of wills, the intention of the testator is to govern, if such intention do not contravene any rule of law. And to ascertain that intention, the court may look through the whole will. Taking these rules for our guide, we cannot fail to see that it was the intention of the testatrix, that the words "*pay five hundred*" were to pay $500. All the money legacies in the will, which are both before and after the clause in question, are expressed in dollars. In the said clause, the testatrix directs her *executors* to *pay* the said sum to the plaintiffs. It is therefore a legacy. A legacy is defined to be, "some particular thing or things given or left, either by a testator in his testament, wherein an executor is appointed, to be paid or performed by his executor, or by an intestate in a codicil, or last will, wherein no executor is appointed, to be paid or performed by an administrator." Williams on Ex'rs 694. Godolph. Pt. 3, ch. 1, sec. 1.

Secondly. Is the legacy a general legacy? We think it is. The testatrix intended to convert her lands out and out, and add the purchase money to her personal estate. Now, whatever force there may be in the argument, that as the power to the executors to sell the land, is in the same clause in which she directs her executors to pay the plaintiffs the $500, this is tantamount to declaring that the executors are to pay the said sum *out* of the purchase money, we need not inquire: For her declaration in the residuary clause of the will, "those legacies paid off which I have already given away," shew a plain intention on her part, that the plaintiffs should have the sum, as a general legacy. We are of the opinion that the executors must account, and if the personal estate not specifically given away be insufficient to pay all the general legacies, then they must abate in proportion.

PER CURIAM. Decree accordingly.

NOTE.—See the case of *Dew* v. *Barnes*, 1 Jones' Eq. Rep. 149, in which it was held to be well settled, that in the construction of a will, in order to arrive at the intention of a testator, one or more words will be supplied when the sense of the clause in question, as collected from the context, manifestly requires it.

ELIZABETH PAYNE *v.* ANTHONY SALE et al. [455]

Where a testator bequeathed as follows: "I lend unto my son A. W. and my son-in-law A. S., in trust for the only use and benefit of my daughter B. P., during her natural life, against the claims or control of her present or future husband, the following negroes, &c. My will and desire is, that the negroes left to my son A. W. and A. S., in trust, for the use and benefit of my said daughter B. P., against the claims or control of her present or future husband, during her natural life, shall be equally divided amongst the heirs of her body forever, but for want of such, my will and desire is, that the said negroes be equally divided amongst my other children and their representatives:" *It was held*, that the limitation of the slaves to the daughter for life, in the first clause of the will, was of the *equitable* interest only; that the legal estate in the trustees was but coextensive with her life-estate; that the second clause of the will contained a limitation of the *legal* estate to the heirs of her body, after her death; that the two estates being of different natures, one equitable and the other legal, could not unite; and therefore that the daughter, Mrs. P., took under the will of her father, only a life, instead of an absolute, interest in the said slaves.

The extent of the legal estate given to trustees in a will, where the words are not too strong to be thereby controlled, may be collected from the trusts declared upon it.

Simon Williams died in the year 1808, having previously, by his last will duly executed, made a disposition of certain slaves in the following words, to wit:

"I lend unto my son, Alanson Williams, and my son-in-law, Anthony Sale, in trust for the only use and benefit of my daughter, Betsey Payne, during her natural life, against the claims or control of her present or future husband, the following negroes and their future increase: Teresa and her two children, the names not known, Daniel, Ransom and Creecy. My will and desire is, that the negroes and their future increase, lent to my son, Alanson Williams, and Anthony Sale, in trust for the use and benefit of my said daughter, Betsey Payne, against the claims or control of her present or future husband, during her natural life, shall be equally divided amongst the heirs of her body forever; but for want of such, my will and desire is, that the said negroes and their future increase be equally divided amongst my other children or their representatives."

The bill was filed by the plaintiff claiming the absolute equit-

able interest in the slaves mentioned in the above recited clause of the will of her father.

To this bill the defendants put in a demurrer, which his honor Judge SETTLE, at Granville, on the last circuit, sustained, and dismissed the bill; and the plaintiff appealed.

[456] *Winston*, for the plaintiff.

W. H. Haywood, for the defendants.

GASTON, Judge, after stating the case as above, proceeded as follows: The question for our decision is, whether the legal effect of these bequests be to vest the *absolute* equitable interest of the slaves in the testator's daughter, Mrs. Payne, or only the equitable interest therein *during her life.* The court has fully considered the subject, and is of opinion that the latter is the correct exposition of the will. It was insisted in argument by the counsel for the plaintiff, that where a testator bequeaths personal property to one for life, and after his decease to the heirs of his body, such a bequest gives the whole interest in the property to the legatee, and a subsequent bequest over, on failure of heirs of the body, is too remote, and of no effect—that as equity follows the law, the same construction prevails upon a bequest made by like words, not of the property itself, but of the equitable estate therein; and that in the will before us, there is a bequest in trust for the daughter, for life, and after her decease, for the heirs of her body. The correctness of the *general* doctrine asserted in this argument, with respect to wills executed before the 15th of January 1828, is not denied, and whether it has been changed, and if so, how far it has been changed, as to wills subsequently executed, by the act of 1827, (1 Rev. Stat. ch. 43, sec. 3,) directing what construction shall be given to contingent executory limitations, it is unnecessary now to examine. But the true difficulty in the case is, whether there be, in this will, a bequest in trust for the daughter, for life, and afterwards for the heirs of her body.

The doctrine is confessedly founded upon a settled principle of construction, that whatever disposition would amount to an estate tail in land, gives the whole interest in personal property. Now, it is a fundamental rule of law, that where an ancestor,

by any gift or conveyance, takes an estate of freehold in land, and in the same gift or conveyance there is a limitation by way of remainder to the heirs of his body, these words are words of limitation of the estate, and not words of purchase; and, therefore, such remainder is immediately executed in possession in the ancestor so taking the freehold, and is not [457] contingent or in abeyance. But, it is clear that this rule of law cannot operate where the estate limited to the ancestor, and the estate limited to the heirs of his body, are of different natures, so that they cannot unite—as, if the first limitation to the ancestor gives only a trust estate, and the subsequent limitation to the heirs of his body passes the legal estate. *Lord Say & Sele* v. *Jones*, 3 Bro. P. Ca. 113; 8 Viner (Devise C. b.) 262; *Silvester on dem. Law v. Wilson*, 2 Term 444. And wherever, for any cause, these limitations do not unite, then, in a bequest of chattels, as well as in a devise of lands, the ancestor takes but an estate for life, and the persons designated by the description of heirs of his body, take under the subsequent limitations, as purchasers; and an executory limitation over, for want of such heirs, may be a good executory bequest to take effect, if there be no such person in existence at the termination of the life estate. *Withers* v. *Algood*, cited in *Bagshaw* v. *Spencer*, 1 Ves. 150; 1 Roper on Leg. 355. In the case before us, it is indisputable that the interest bequeathed to Mrs. Payne is an equitable interest or trust; and the important inquiry is, whether that limited or bequeathed to the heirs of her body be also an equitable interest or the legal property.

The two bequests are to be found in two distinct clauses or sentences of the will, in no way connected—(not even by a conjunction)—except by their relation to the slaves, the common subject matter of each bequest. In the bequest immediately under consideration, the words are, "My will and desire is, that the negroes and their future increase, lent to my son, Alanson Williams, and Anthony Sale, in trust, for the use and benefit of my daughter, Betsey Payne, against the claims or control of her present or future husband, during her natural life, shall be equally divided amongst the heirs of her body forever; and for want of such, my will and desire is, that the said negroes and their future increase be equally divided a-

mongst my other children or their representatives." A will is defined to be "the just sentence of our will touching what we would have done after our death." The words, therefore, with which this sentence begins, and which are subsequently
[458] repeated with respect to the alternative disposition afterwards expressed, "my will and desire is," are as appropriate for a testamentary disposition as any that could have been selected, and are therefore equivalent to express words of gift. The subject matter of the gift is declared to be *the slaves themselves.* These—the slaves—and not the use, trust or beneficial interest in them—are given, and given *forever* to the persons, whoever they may be, described as the heirs of the body of Betsey Payne. Nay, *in terms* they are given *directly*, and not after the death of Betsey Payne, and amount to a gift of the whole interest of the testator, subject to the exception of that part of his interest which is referred to as having been previously taken out; and this is here described as a *loan* to Alanson Williams and Anthony Sale, in trust, for the use and benefit of Betsey Payne, free from the claims or control of her present or future husband, *during her natural life.* The latter words are here used as obviously expressive of the extent or duration both of the trust and the loan; and upon this clause or sentence, *per se*, the necessary construction of the bequest is, that it passes to the legatees described in it, the slaves themselves, subject to the exception of the particular estate therein previously carved out. Certainly, however, this construction will yield to a manifest intention of the testator, to be collected from other parts of the will, that the general or ulterior bequest was designed to be, not of the slaves, but of the equitable interest in them; and this intent, if it be found at all, must be found in the preceding clause or sentence of the will. The words of that are, "I lend unto Alanson Williams and Anthony Sale, in trust, for the only use and benefit of my daughter, Betsey Payne, during her natural life, against the claims or control of her present or future husband, the following negroes, (naming them,) and their future increase." The argument is, that the term "lend" is sufficient in law to pass the absolute property in the negroes to Williams and Sale; and, therefore, must be held to pass the absolute property, unless there be

other words to cut it down to a temporary gift only; that the subsequent words, "during her life," are restrictive of that part of the trust declared in this sentence, that is to say, for the *sole* use of Betsey Payne during her life; that the whole legal estate being thus conveyed in this clause to these [459] persons, it would be inconsistent with that disposition, to suppose any legal estate to be given, or attempted to be given, in the succeeding sentence; and, therefore, in order to reconcile these two sentences to each other, it is necessary to intend, that in the last the testator declared only the residue of *the trust* upon which, after Mrs. Payne's death, the trustee should hold the slaves so absolutely given to them.

In considering this argument, it is proper to bear in mind that the present inquiry is not what legal operation may be assigned to the term "lend," in order to effectuate the disposition, but whether we can collect from that term, taken in connection with the other words in the sentence, an intent to pass the absolute property to Williams and Sale, so clear as to overrule the intention to give a legal estate in the slaves to others, as is apparently declared in the succeeding sentence. We are expounding a will, and in such an instrument there is not only no reason why a former should be made to control a subsequent disposition, but the first part must give way to—nay, will be repealed by—the last part thereof, if in truth they be contrary to each other. But the great rule of construction, as has been repeatedly recognized, is that laid down in *Paramour* v. *Yardley*, "that words in a will are to be so favorably expounded that the intent of the testator, appearing in the will, may be performed in every point, and not a jot be confounded; to which end it is the office of judges to marshal the words of wills; and the more so, if it be considered that wills are, for the most part, made in the party's last moments, when he has not time to apply to, or advise with, counsel in the law; and that testators themselves, in general, are unacquainted with the law, and know not how to put their words in their proper order, for which reason their ignorance and simplicity demands a favorable interpretation of their words." 2 Plow. 540 b. The exercise of a very moderate portion of this benignity will be sufficient so to expound this will, that the intent of the testator

will be fulfilled in every point, and not a jot thereof be confounded, by simply attributing to his words their popular, instead of an artificial construction. Now, the term em-
[460] ployed by the testator, in the disposition of the slaves to Williams and Sale, is "lend;" and whatever legal operation this term may have, if there be nothing to shew the extent of the disposition thereby intended, it cannot be questioned but that, according to its popular sense, it is always used to designate a temporary, instead of an absolute gift. Nor is there much difficulty in collecting from the very sentence in which it is contained, the intended duration of this loan. For, immediately after this temporary gift to Williams and Sale, follows, not the subjects of disposition, but a declaration of the purposes of this loan. "I lend to Alanson Williams and Anthony Sale, in trust, for the only use and benefit of my daughter, Betsey Payne, *during her natural life.*" The duration of the loan is plainly indicated by the purposes of the loan. That the extent of the legal estate given to trustees in a will, where the words are not too strong to be thereby controlled, may be collected from the trusts declared upon it, seems too plain a principle of good sense to need authority for its support; but authorities are abundant. See *Doe dem. Woodcock* v. *Barthrop*, 5 Taunt. 383; *Doe dem. Player* v. *Nicholls*, 1 Barn. & Cress. 336; and 2 Dow. & Ryld. 480. "I take it," says Mr. Justice Bayley, in the latter case, "to be a settled rule in the construction of wills, that the estate given to a trustee is to continue for so long a period only as is necessary to effect the purposes of the trust." The declared trust here follows instantly upon the estate limited to the trustee, by an expression imparting a partial disposition; and the *only* purpose of it is for the use and benefit of Mrs. Payne, so long as she should live. To construe the word "lend," thus used, to convey the slaves to the trustees *for ever*, would seem to be a wresting of it from the sense in which it was understood and used by the testator. And for what end? Nothing is more usual in bequests of slaves, especially as a provision by a parent for his children and their descendants, than to interpose trustees for the protection of his daughters against the extravagance of their husbands, and thereby secure to them the beneficial enjoyment during their lives; and nothing more

unusual than to create trustees to take a legal estate for those to whom the *absolute* estate in equity is meant to be [461] given. *Cui bono* can this be intended? What useful object can be accomplished by a mere severance of the entire legal, from the entire equitable, estate? It has been already intimated, that if the word "lend" had been used by the testator in the sense of a gift *forever*, the subjects of the gift would probably have been named before a declaration of the temporary purposes for which the donees were to hold them; and in connection with this intimation, it may also be remarked, that if the testator had contemplated a *trust* which was to last forever, it seems not a little extraordinary that he did not defer a declaration of this trust until the property to be subject to it had been designated, and then have declared the *whole trust* continuously. According to the construction of the will contended for by the plaintiff, he is supposed to make known this trust by detached parcels—that is to say, declare so much of it as related to the property while Mrs. Payne might live, before the property was named, and *hint* the residue of the trust, after naming the property. But, it is still more strange that he should not only have thus broken off, after a partial declaration of the trust, before he had declared it fully, but should have left us to collect the residue of the trust from words contained in a subsequent independent clause of the will, which, instead of intimating a trust, purport to convey the absolue legal estate. But, whatever may be the effect of the operative words conveying the legal estate in the first sentence, they cannot be imported into the latter sentence, without violence to the structure of both of them. Each is complete. The first finishes the disposition of the property thereby intended. The second takes up the subject *de novo*. It begins with distinct legatory words; names the property again; and designates new objects to whom the property is given. These distinct gifts are to be so construed as that they may both stand—and they will both stand, by understanding the first to be a gift during the life of his daughter, and the other to be a gift of the residuary interest not disposed of in the first.

By this interpretation, we shall carry into full execution the manifest purposes of the testator. It cannot be doubted

[462] but that he intended, by the disposition made of this property, that while it should be secured for the sole use of his daughter while she lived, exempt from the power of her husband, it should be also secured even *against her* as a permanent provision for her children, if she should leave children; and if not, then for her brothers and sisters. A construction which would give the trustees the whole legal estate, would defeat the undoubted purposes of the testator; for then the equitable remainder to the heirs of her body must unite with her equitable life estate, and make her, what this bill insists that she is, the absolute owner in equity, and entitled to a conveyance of the legal estate. But by holding that the trustees take the legal estate during her life only, the limitation to the heirs of her body is to them so described as purchasers. If Mrs. Payne should leave children, they will succeed to the property as the persons thereby designated. If she should not leave children, then the alternative limitation to the other children of the testator will take effect. Now, wherever it can be done without violating legal principles, Courts of justice feel it a duty to effectuate the full intent of a testator. In the present case, we think no such principle is violated, by the construction we adopt.

The decree below, sustaining the demurrer and dismissing the bill, is affirmed.

PER CURIAM. Decree affirmed.

NOTE.—The rule in Shelly's case has been applied to bequests of personalty as well as to devises of land, and the doctrine has been considered as settled ever since the case of *Ham* v. *Ham*, 1 Dev. & Bat. Eq. Rep. 598. See *Floyd* v. *Thompson*, 4 Dev. & Bat. Rep. 478; *Bradley* v. *Jones*, 2 Ired. Eq. Rep. 245; *Donnell* v. *Mateer*, 5 Ired. Eq. Rep. 7; *Coon* v. *Rice*, 7 Ired. Rep. 217; *Worrell* v. *Vinson*, 5 Jones' Rep. 91. Where the legal estate is given to one for life, and the equitable estate only is limited to the heirs, or heirs of the body of such tenant for life, or *vice versa*, the rule will not apply as appears in the principal case. Another exception is where, to the terms "heirs" or "heirs of the body," there are superadded words, as "executors, administrators and assigns," or the words "equally to be divided," and the like. See *Swain* v *Roscoe*, 3 Ired. Rep. 200.

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Although the motive assigned for the execution of an instrument, to-wit: the desire of removing strife about the enjoyment of the property after the death of the maker—the disposition attempted of property that might be acquired thereafter, and before death—and the injunction on trustees named therein, to pay death-bed and funeral expenses—may unequivocally point to the death of the maker, as a period after which some at least of his purposes are to be executed, and are indications of the testamentary character of the instrument; yet they are by no means conclusive. It does not follow, because an instrument is to produce important results after death, that therefore it must be testamentary. To render it so, it is essentially necessary that it should be made to *depend* on the event of death as *necessary to its own consummation.* And therefore, if the instrument, notwithstanding the above-mentioned indications of a testamentary character, be in *form* a deed; if it do not use a word of a gift after death—of devise—or of bequest; if it import a present disposition of property to the persons therein named as trustees, "with power" to them "to sell and dispose of said estate, bring actions, &c., and generally to do every thing in the premises that" the maker "could have done before the granting" thereof; and if the maker reserve his "own life-rent in the premises, and power to alter, innovate or revoke these presents, in whole or in part, at any time hereafter," it will be held to be a deed, and not a will or testament.

Where an assignment is absolute and unconditional, and leaves no remaining liability or right in the assignor which can be affected by the decree, the assignee need not make the assignor a party. But whether, if he be needlessly made a party, it is a valid ground of defence, *Qu?* But however this may be, if there remain any interest, right, or liability in the assignor, which can be affected by the decree—a *scintilla juris* even—then he is a proper, and, in most instances, a necessary party. And therefore, a trustee holding for the separate use of a married woman, and for certain contingent trusts, will be a proper and necessary party in a bill by the married woman, although he has executed a deed purporting to assign his whole interest to her.

The next of kin may sustain a bill against the executor of the deceased administrator of an intestate, for an account and settlement of the intestate's estate in his hands, as well as against the administrator *de bonis non* of such intestate.

The case of *Brotton* v. *Bateman*, 2 Dev. Eq. Rep. 115, approved.

In a limitation of property to two sisters, and to the survivor upon the death of either without children living at her death, the word "children" means legitimate children; and if either of the sisters die, leaving illegitimate, but no legitimate, children, the whole property will go to the surviving sister.

Where an administrator dies, commissions may be allowed his estate [464] for his services in managing his intestate's estate, though his executor set up an unconscientious resistance to the claim of the next of kin of the intestate.

Whatever respect a Court of Equity might feel itself bound to pay to an order of the County Court, settling the rate of an administrator's commissions, had it been made before the suit was instituted, it regards such an order in relation to a matter under investigation before itself, as furnishing no criterion by which to regulate the proper allowance.

If an estate be limited to two, and upon the death of one to the survivor, the interest or profits of a moiety of the estate during the life of the one first dying, do not pass over to the survivor with the estate, but belong to the representatives of the deceased.

Persons claiming under an instrument cannot have relief under a bill setting up the instrument as a deed, if it be simply a will. And *it seems*, an instrument cannot be set up as a will or testament by a bill in equity, but must be brought forward in the proper tribunal, and there proved as a will.

Although it does not necessarily follow, that if an instrument be not testamentary it must have effect as a deed, and although a declaration by the Court that it cannot operate as a deed, may consist with the established fact of the maker's intestacy; nevertheless, this fact is one which should render the court cautious, in giving to the instrument a construction that must render it nugatory; for it is the duty of courts to be benignant in the interpretation of solemn and deliberate acts, so that they may avail, if possible, rather than perish altogether.

Where an instrument, under which the plaintiffs claim, is set forth in their bill, if the defendants wish to avail themselves of the defence that the instrument does not, by the laws of the foreign country where it was executed, operate to convey the interests which it purports to convey, they ought, in fairness, to raise that defence upon the record, so as to put the fact in relation to that law distinctly in issue; and although, if they do not admit the fact in their answer, they will not be precluded from denying it, yet the court will not expect the same plenary proof in relation to it, or draw the same inference from scantiness of proof, as if the pleadings had shewn that it was a material fact directly controverted between the parties.

There is always difficulty in the court of any country undertaking to fix the construction of an instrument made in a foreign land, with the laws of which it is not familiar. The only mode of encountering that difficulty, where there is not an allegation established by proof that the instrument has a technical meaning different from that which its words import in *their ordinary sense*, is to understand the instrument according to its obvious import.

The word "children," *per se*, imports in law, legitimate children, and none but legitimate children can be understood as embraced in an instrument providing for "children," unless it manifestly appear that natural children were thereby intended. Nor is the legal import of the term "children" at all altered by the acts of our Legislature, (see 1 Rev. Stat. ch. 38, rule 10, and ch. 64, sec. 4,) which permit, where a woman dies intestate, and without legitimate children, those commonly called illegitimate or natural children, to succeed to the property of their mother.

The master in reporting upon an administrator's account referred to him, should state what he deems a reasonable commission for the administrator; and if he

do not, the court will, if it deem it necessary, recommit the report for his revisal in that particular.

If a claim be right in principle, but the party omitted to advance it before the master, and it does not appear that in fact there is any ground for it, or if there be, it is very inconsiderable, the court will not recommit the report on account of it.

The plaintiffs in this case were Sarah Lenox Thompson, otherwise called Sarah McKinnell, suing by her next friend James Stuart, Alexander Kissock, James Broom and George Blount, and the defendants were Jane McDonald, widow and executrix of Ronald McDonald, deceased, Robert Martin, administrator *de bonis non* of Ann Charteris, deceased, John W. Ellington and John McKinnell. The case made by the bill was, that John Lenox, a native of Scotland, but for many years a citizen of North Carolina, died in this State intestate, unmarried and without issue, some time in the year 1825, and that administration on his estate was granted to James T. Morehead, Esq., and Ronald McDonald; that at the death of said intestate, his sole next of kin were the defendants, Jane, then the wife of the said Ronald McDonald, John Charteris, of this State, and Ann Charteris, of Scotland; which said Jane, John and Ann, were the children of Mary Charteris, deceased, the sister of the said John Lenox: that the said Ronald McDonald received the full distributive share of his wife Jane, in her uncle's estate: that John Charteris received but a very inconsiderable portion of his share before he died, in the year 1827, having previously executed a last will and testament, whereby he bequeathed all his personal estate to his sisters, the said Jane McDonald and Ann Charteris, and the said J. T. Morehead was appointed administrator of the said John with the will annexed; that in the year 1830, the said Ann died in Scotland, intestate, without having received any part of her said distributive share; and that upon the receipt of intelligence of her death in this State, the said Ronald [465] McDonald procured letters of administration here upon her estate. The bill further shewed that Ann Charteris never was married, but had an only child, the plaintiff Sarah, born out of wedlock, in Scotland, where both have always resided; that the said Sarah was recognised as the child of the

said Ann, and brought up by her as such, to the knowledge of the said Ronald and his wife, and was nearly grown and perfectly known to the said Ronald and his wife when they emigrated from Scotland to North Carolina, in 1820 or 1821; and that the said Sarah shortly thereafter intermarried with the defendant, John McKinnell, of Dumfries, in Scotland, who, in the year 1822, after treating his wife with great indecency, abandoned her altogether, went off to parts unknown to her, and has never since cohabited with or been heard of by her. The bill then charged that the said Ann Charteris, on the 13th of April 1830, a few months before her death, by a disposition and deed of settlement, executed at Dumfries aforesaid, and which, by the law of Scotland, was effectual to transfer all her estate and interest in the subject matter thereof, did "bequeath, assign and convey to Alexander Kissock, residing at Lawricknowe, James Broom, Town Clerk of Dumfries, and George Blount, spirit-dealer there, and to the survivors and survivor of them, any two, while so many remain, being a quorum for managing the trust thereby committed to them, all and singular, the heritable and moveable real and personal means and estate then belonging to her, wherever the same might be situated, whether in Britain or in countries abroad, at the time of her death; and particularly, without prejudice to that generality, the whole means and estate heritable and moveable, to which she had a right as niece of John Lenox, her uncle, who was brother-germain of her mother; and also of her brother, John Charteris, also deceased, situated in the United States of America, or wherever the same might be situated, together with the whole writs and title deeds, vouchers and securities, of and concerning the said estate; and the said Ann did thereby constitute and appoint the said trustees, and the survivors and survivor of them, her sole executors and universal [466] legators and intromittors, secluding and debarring all others; and did further provide that the said Alexander Kissock should have the sole control and management of the trust fund during his life; and declared that the said presents ere granted in trust for the payment of all her just and lawful debts, death bed and funeral charges, and a reasonable gratification to her trustees, for their trouble and the expenses

of management; and after these purposes should be fulfilled, the residue should be had by her said trustees, the said Alexander being sole managing trustee during his life, for the use and benefit of her natural daughter, Sarah Lenox Thompson, wife of John McKinnell, and the children of her body, secluding entirely the *jus mariti* of her present and any future husband, and debarring all administration and management by him." The bill further charged that the said trustees, after accepting of said deed, and after corresponding with the said James T. Morehead, Esq., and Ronald McDonald, by whom their authority was recognised, did, on the 4th and 6th days of August 1832, at the request of the plaintiff, Sarah, execute unto her their deed of devolution and transference, conveying to her the whole trust property as amply as they had held it for her use, which was accepted by her, whereby the said trustees denuded themselves of their trust, and the said plaintiff became entitled to receive the fund, in whose hands soever it might be. The bill charged that Ronald McDonald, some time in the year 1834, in order to save harmless the defendant Robert Martin, who was the surety of the said Ronald for the faithful administration of the estate of Ann Charteris, and to defeat and hinder the plaintiff Sarah in the recovery of what was justly due to her, made a conveyance of the whole or greater part of his property to the defendant, John Ellington, in trust, for the said Robert; that the said Ronald received a large amount of money, property and effects, as belonging to the estate of his intestate, the said Ann, and died in the month of November 1834, having previously made his last will and testament, wherein he appointed his wife Jane his sole executrix and legatee; that she had proved the said will, and taken into her possession the whole estate, as well of her husband as of her husband's said intestate; that the said [467] Robert Martin had been appointed administrator *de bonis non* of the said Ann, and had received, or shortly would receive, as such, a large sum as of the estate of his said intestate. The prayer of the bill was, that the said Jane McDonald, as executrix of Ronald McDonald, and the said Robert Martin, as administrator of Ann Charteris, might come to an account with the plaintiffs for all the assets of the said Ann

which had come to them respectively, whether from the estate of John Lenox or the estate of John Charteris, or otherwise, and might be decreed to pay what might be justly due on such account; that in default of payment, the said John Ellington might be decreed to sell the trust fund is his hands for the satisfaction thereof; that John McKinnell, the husband of the plaintiff Sarah, might be made a party defendant; and for general relief.

The answer of the defendant Jane McDonald admitted the death and intestacy of John Lenox, and the administration on his estate as charged, and admitted that the said Jane, her sister Ann and her brother John, were his next of kin; that the said John died, having previously made his last will, the administration of which was confided to James T. Morehead, Esq., as charged; that her sister, the said Ann, died in Scotland, and that Ronald McDonald administered on her estate; that Robert Martin was surety for the said Ronald on his administration bond, and that the said Ronald executed a conveyance of some property to the defendant, John Ellington, for the indemnity of the said Robert; and that the said Ronald had died, having made a last will, whereof he appointed her executor; which will she had proved. This defendant denied that her sister, the said Ann, ever had any child, and protested her utter ignorance of the existence of such a reputed child; and, in the most explicit terms, disclaimed all acquaintance with the plaintiff Sarah. The defendant did not admit the execution of the alleged deeds, or either of them, as charged in the bill; and prayed that the plaintiff might be put to strict proofs thereof; and insisted that her sister, the said Ann, having died childless and intestate, without having made any disposition of her property in her life-time, she, the defendant, became wholly entitled to her personal estate; and that the plaintiffs had not, nor
[468] had any of them, a right to demand an account thereof.

The answer of Robert Martin contained the same admissions as were set forth in the answer of Jane McDonald. This defendant stated, that having become the surety of Ronald McDonald on his administration of the estate of Ann Charteris, the said Ronald executed a conveyance of certain property named therein, to indemnify the defendant from injury

therefrom, and protested that the same was executed, not to hinder or delay the plaintiffs, or either of them, but *bona fide* for the purpose therein mentioned. This defendant admitted, that on the death of Ronald McDonald, he obtained letters of administration *de bonis non* on the estate of Ann Charteris. Of the other matters charged in the bill, defendant declared that he was ignorant, and required that the plaintiffs might be put to the proof thereof.

The defendant Ellington admitted that he was a trustee in the deed executed for the indemnity of Robert Martin, and declared his entire ignorance of the plaintiffs, and of the matters alleged by them, whereon their pretended claim was founded.

To these answers the plaintiffs entered a general replication. As to the defendant McKinnell, publication was made, and the bill was taken *pro confesso* against him, and was set down to be heard *ex parte.*

Upon the hearing, the proofs clearly established, that the plaintiff Sarah was the natural daughter of Ann Charteris; that she had been acknowledged as such by her mother, from the day of the said Sarah's birth in 1799, up to the death of the said mother in 1830, and had been generally known as such by the acquaintances of the family of her mother; that she intermarried with the defendant, John McKinnell, with whom she lived not quite a year; and that he had wholly separated from her. The instruments, called in the bill the deeds of settlement and devolution, were also produced, and their due execution according to the laws of Scotland satisfactorily proved.

W. A. Graham, for the plaintiffs.

Boyden, for the defendants.

Gaston, Judge, having stated the case as above, pro- [469] ceeded as follows: The right of the plaintiffs to the accounts demanded, has been resisted on several grounds.

In the first place, it is insisted that the claim of the plaintiffs cannot be upheld, unless the instrument of the 13th of April 1830, be established as a deed, effectual to transfer the interest of Ann Charteris, in the personal estates of her deceased uncle and brother, to the trustees therein named. The plaintiffs have

not, it is argued, pleaded this instrument as a will, or testamentary disposition, to take effect after her death, and, therefore, cannot claim under it as such; and if they had so pleaded it, this Court could not recognize it as a will or testamentary disposition, until its validity had been established by probate in the proper forum. Now, without denying that the instrument has been executed in the form and with the ceremonies required in the execution of deeds, it is, nevertheless, insisted, that it cannot operate as a deed, because its dispositions are, in their nature, merely testamentary; purporting to take effect after the death of Ann Charteris, and dependent upon her death as an event necessary to the consummation of the instrument. To support these views, the attention of the Court, besides being called to the general scope of the instrument, was particularly directed to that part of the proem wherein the maker uses these words, "considering the propriety of so arranging my affairs, while I am of sound disposing mind and memory, as to prevent disputes at my death,"—also to the disposition made of "all and sundry the heritable and moveable, real and personal means and estate now belonging to me, or that may pertain and belong, or be due and indebted to me at my death"—also to the clause, "and I do hereby constitute and appoint my said trustees, and the survivors and survivor of them, and the heir of the survivor, to be my sole executors and universal legators and intromitters, with the said moveable and personal means and estate, secluding and debarring all others"—also to one of the trusts therein declared, viz: "in trust for the payment of all my just and lawful debts, death bed and funeral expenses,"—and, finally, to the clause in which she declares

"and I reserve my own life rent in the premises, and
[470] power to alter, innovate and revoke these premises, in whole or in part, at any time hereafter; and dispense with the delivery hereof, and declare these presents to be valid and effectual, though found lying in my own repositories, or undelivered at the time of my death." These, it is said, clearly show, notwithstanding the form of the instrument, that it was made in contemplation of death, for the disposition of property that might not be acquired until the last moment of life, for purposes to be executed after death, with the reservation of the

use of the property, and the power of revocation during life, and conferring an office which could be called into existence but by the death of the maker of the instrument—that it is therefore an instrument altogether testamentary in its properties—and cannot, without violence to the plain intent of the maker, be allowed to operate as a deed taking effect from the execution thereof.

We assent to the proposition that the plaintiffs cannot have relief by this bill, if the instrument in question be one simply testamentary; and we also think, (although it is unnecessary to give a judicial opinion upon that point,) that, were the instrument a will or testament, the plaintiffs could not set it up by a bill, but ought to bring it forward before the appropriate tribunal, have the letters of administration recalled and vacated, and cause it to be there *proved* as a will. But before we refuse to the instrument the operation of a deed, we must be fully satisfied that it is simply testamentary, and cannot, by law, operate as an act *inter vivos*. The defendant Jane McDonald is called to account for the conduct of her testator in the management of the estate of Ann Charteris, which was confided to him *as the administrator* of the said Ann. The defendant Robert Martin is called to account for his management of the same estate, afterwards confided to him also as her administrator. Those grants of administration, unrepealed, conclusively establish that the said Ann died intestate. Now, although it does not necessarily follow, that if the instrument in question be not testamentary, it must have effect as a deed; and although our declaration that it cannot operate as a deed, may consist with the established fact of her intestacy; nevertheless, this fact is one which should render us very cautious, [471] in giving to the instrument a construction that must render it nugatory. It is the duty of courts to be benignant in the interpretation of solemn and deliberate acts, so that they may avail, if possible, rather than perish altogether. Besides, the plaintiffs have not, in their bill, alleged in general terms, that the said Ann, by deed duly executed, had conveyed all her interest in the property in question to the plaintiff's trustees, for the sole and exclusive benefit of the plaintiff, the *cestui que trust;* but have set forth, almost *verbatim*, the opera-

tive words of the instrument, and the trusts therein declared, and have referred to a copy of the instrument, ready to be produced, and which they proffered to produce on demand. Now it seems to us, that if the defendants meant to raise the defence, that the instrument so set forth, to an inspection of a full copy whereof they were entitled before making defence, and the execution of which they called upon the plaintiffs to prove, was, when proved, inoperative, by the law of Scotland, to transfer the interest which it purported to convey, they ought, in fairness, to have raised that defence upon the record, so as to put the fact in relation to that law distinctly in issue, and apprise the plaintiffs of the necessity of exhibiting proofs thereupon. Certainly they have not, by their answers, admitted, and are not, therefore, now precluded from denying, the fact; but we do not expect the same plenary proof to establish it, nor are we disposed to draw the same inferences from scantiness of proof, in relation to it, which we might have thought it reasonable to require and infer, if the pleadings had shewn that it was a material fact, directly controverted between the parties.

The only *direct* evidence which we have concerning the law of Scotland on this subject, is contained in the deposition of James Thompson, a professional gentleman of that country, who testifies "that the deed of settlement" which has been inspected by him, "is a deed, completed according to the forms established by the law of Scotland, for executing the deeds of illiterate persons who cannot write." We must therefore regard it *as a deed*, in all respects, *complete*, unless its contents show that it cannot operate as a deed. There is always difficulty in the court of any country undertaking to fix the
[472] construction of an instrument made in a foreign land, with the laws of which it is not familiar. The only mode of encountering that difficulty, where there is not an allegation, established by proof, that the instrument has a technical meaning, different from that which its words import in *their ordinary sense*, is to understand the instrument according to its obvious import.

There are, undoubtedly, passages in this deed, which, referring distinctly to things to be done after the death of the maker,

give it the similitude of a testamentary paper. We are not so much struck with the clause in which she constitutes her said trustees and the survivors and the survivor of them, and the heir of the survivor, "to be her sole executors and universal legators and intromitters, with the said moveable and personal means and estate, secluding and debarring all others;" for most of the terms here employed are evidently merely technical, and used with reference, not to our law, but to the law of Scotland; and without an acquaintance with that law, they are to us necessarily in a great measure unintelligible. We are the more sensible of the hazard of undertaking to expound these technical terms, by adverting to other parts of the instrument, where technical language is also used, or there is a reference to legal forms with which we are unacquainted. Towards the close of the instrument, the supposed grantor says, "and I *dispense* with the delivery hereof, and declare these presents to be valid and effectual, *though* found lying in my own repositories, or in the custody of any other person, undelivered at the time of my death." And again: "and I consent to the registration hereof in the books of council and of sessions, or others competent, therein to remain for preservation; and that all necessary execution may pass on a decree to be interposed thereto, in common form, and for that purpose constitute my procurators." If, upon the technical meaning which the word "executors" bears in our law—that is to say, of persons appointed to execute *the will* of one who is deceased—we should judicially conclude that the instrument itself must be testamentary, while we are ignorant of the meaning of the immediately following terms, "uni- [473] versal legators and intromitters"—while we know not what is meant by the maker of an instrument, proved to be a deed completed with all the forms of law, dispensing with the delivery thereof, and declaring it to be valid and effectual, although it should never be delivered in her life-time—while we are wholly uninformed what is the legal effect of a "consent that it shall be registered in the books of council or session"—or of consent "that execution may pass on a decree to be interposed thereto in common form—and of the constitution of" (blank) "procurators for that purpose," our conduct would be scarcely

less rash than that of an individual who should venture to perform on oath the office of interpreter of a speech in a foreign tongue, because he caught one word, the sound of which was familiar to his ears. But this reference to the disposal of the property and to the conduct of the trustees after death, is manifested by language in no respect technical, and as to the meaning of which there is little or no room for mistake. The motive assigned for executing the instrument—the disposition attempted of property that might be acquired thereafter and before death—and the injunction on the trustees to pay death-bed and funeral expenses, unequivocally point to the death of the maker as a period after which some at least of her purposes were to be executed, and are indications of the testamentary character of the instrument, well deserving of notice. But they are by no means conclusive. It does not follow, because an instrument is to produce important results after death, that therefore it must be testamentary. To render it testamentary, it is essentially necessary that it should be made to *depend* on the event of death as *necessary to its own consummation.* Permanent dispositions of property, however made, whether by acts perfect in themselves or to be perfected by death, must be made with a view to their operation long after the disposer shall have ceased to exist; and although the desire of removing strife about the enjoyment of property when its present owner shall be no more, is a peculiarly appropriate inducement for a testamentary disposition, it is by no means an irrational motive for making a settlement during life. And it may also be
[474] remarked, that however inoperative the instrument may be as a deed to pass property thereafter to be acquired, and however as to that property it may manifest a testamentary inclination, it can have its full effect on the property then held, and so far there is no necessity for denying to it its proper action.

But, whatever influence the indications adverted to might have, unexplained and unopposed, upon the character of this instrument, they are met by others so strongly manifesting the design to do thereby a perfect and consummated act, that we feel little difficulty in declaring the instrument valid as a deed. The *form* of it is a circumstance by no means unimportant. It is certainly true that an instrument, conveying a benefit, what-

ever form it may assume, if it has the character of a testamentary paper to be consummated by death, may be admitted to probate as testamentary. And it is also true, that from a principle, which more or less governs all Courts, to be astute in finding out a mode of giving effect, in one way or another, to every instrument (as was observed by Sir John Nicholl, in *Thorold* v. *Thorold*, 1 Phill. 1,) papers containing dispositions of property to be made after death, although made in the form of and intended to operate as settlements, deeds of gift, bonds or other perfect acts *inter vivos*, yet because they *could not* operate in that character, have been allowed to operate as wills or testamentary papers. And among the most prominent of the instances referred to by that learned Judge, in which this astuteness has been practised, are cases of "Scotch conveyances" —*Masterman* v. *Maberly*, 2 Hagg. 235. Yet these very considerations shew that, *prima facie*, the form of the instrument and the mode of its execution are to be regarded as indicating its distinctive character, and the astuteness exercised to impress upon them a different character, is not only evidence that for this purpose it was necessary to resort to astuteness, but this astuteness is permitted for the purpose only of securing to it some operation.

The general *structure* of the instrument very clearly, we think, imports an immediate conveyance. There is not one word in it of a gift after death, of devise, or of bequest. And here it is fit to notice an error in the bill, where the word "bequeath" is improperly inserted. It does not occur [475] in the instrument. All men are thereby called upon to take notice—these are its words—"that I have given, granted, assigned, disposed and conveyed, *as* I give, grant, assign, dispose and convey," the property therein described to the persons therein named. She then proceeds to *covenant* with these grantees as follows: "and I bind and oblige me and my heirs and *successors*, (it is difficult to imagine who *these* are, if the covenantees be in our sense of the word her executors,) to make and deliver all writings necessary for making these presents valid and effectual." Then, after setting forth the main purposes and trusts for securing the performance whereof the conveyance has been made, *some* of which, it is admitted,

cannot be completely executed until after her death; and in order the better to accomplish the object thereof, power is given to the grantees in these words, "with power to the said Alexander Kissock, &c., &c., to sell and dispose of the said estate, to bring actions for the recovery thereof, to grant conveyances and discharges to the purchasers and others; and generally to do every thing in the premises" (not which I could do, if living, but) "that *I could have done before the granting hereof.*" If any lingering doubt yet remained as to the true character of the instrument, it ought to be removed, we think, by the care which she has used to secure to herself the income or annual value of the property so conveyed in the trust, and the power which she has expressly reserved during life, of revoking the act which she has done. The language of the deed is, "and I reserve my own life-rent in the premises, and power to alter, innovate or revoke these presents in whole or in part, at any time hereafter." How idle is the reservation of a life-rent—or of the income during life, out of the proceeds of property which until death was to remain wholly and absolutely her own! How nugatory the reservation of a power to revoke during life that which was to become her act *only* upon her death!

Nor do we feel the difficulty which has been suggested in the argument, of a repugnancy between the reservation to the donor of a life-rent, and the immediate gift to the trustees of the property out of which it is to arise. The reservation is not
[476] of the property itself, and can clearly be supported by our law—and, as we suppose, by every law which holds it the duty of trustees to preserve inviolate the confidence reposed in them—as a trust which they are enjoined to permit or fulfil. Upon full consideration of this objection, therefore, the Court is of opinion that the instrument in question purporting to be a deed, is valid as a deed to convey the property now in controversy to the persons therein named for the trusts declared by the grantor.

The next objection to the relief of the plaintiffs, relied on by the counsel for the defendants, is, that the trustees are improperly joined with the plaintiff Sarah, as parties plaintiffs. In support of this objection it is said, that if the deed of the 13th

of August 1830, conveyed the property in dispute to the trustees, then it appears, by the shewing of the plaintiffs themselves, that these trustees, by their deed of transference and devolution of the 4th and 6th of August 1832, assigned to the plaintiff Sarah the whole of their estate, title and interest; so that at the time of filing this bill, they had no remaining interest therein or concern therewith. It is then insisted, that, according to the well established principles of Courts of Equity, if there be several plaintiffs in a bill, some of whom have an interest and others have no interest in the matter of the suit, and this appear upon the face of the bill, a general demurrer to the whole bill is a good defence. *King of Spain* v. *Machado*, 4 Russ. 225, (3 Eng. Con. C'y Rep'ts, 643.) It is further insisted, that if this do not appear on the face of the bill, but is brought forward by a plea, such plea is also a good defence to the suit. *Makepeace* v. *Haythorn*, 4 Russ. 224, Ibid. 652. And it is contended, that whether this appear on the face of the bill or not, yet upon its being shewn at the hearing, none of the plaintiffs will be permitted to have a decree; and this position is supposed to be strongly intimated, if not distinctly declared, by the Master of the Rolls, in *Bill* v. *Cureton*, 2 Mylne and Keene 503, (8 E. C. C. Rep'ts. 103,) and by the Chancellor, in *Glynn* v. *Soures*, 3 Mylne and Keene 450, (9 E. C. C. Rep. 132.) For reasons which shall be assigned hereafter, we shall not enter into a full consideration of the questions of pleading and practice which this objection seems to present; but we [477] deem it not amiss to observe, that notwithstanding the intimations of opinion referred to, we leave it as a point fit for further examination, and quite open for discussion, whether an objection to a want of interest in *some* of the parties plaintiffs, which might have been effectually urged by way of demurrer or plea, will be deemed fatal to the relief of the others, if, at the hearing, the case be made out on which the bill claims relief. And while we distinctly admit the position, that where one, who has no right to sue by himself, and who is an entire stranger to the defendant, is joined as a co-plaintiff with those having a right to sue the defendant by themselves, advantage may be taken of this improper joinder by plea or demurrer, we are not prepared to say that this principle ever applies

where assignor and assignee join in the assertion of a claim, as to which there has been at least—if it do not yet continue—a privity between each of them and the defendant. We find the doctrine thus far completely settled, that in those cases where the assignment is absolute and unconditional, and leaves no remaining liability or right in the assignor which can be affected by the decree, the assignee *need* not make him a party. But we have not found that if he be needlessly made a party, *this* constitutes a valid ground of defence. See *Ryan* v. *Anderson*, 3 Mad. 97; *Smith* v. *Brooksbank* and *Moore* v. *Blagrave*, 7 Sim. 18, (9 Con. E. C. Rep'ts, 456, 458.) But, however this may be, it is certain that if there remain, notwithstanding the assignment, any interest, right or liability in the assignor, which can be affected by the decree—a *scintilla juris* even—there he is a proper, and, in most instances, a necessary party. Such is the case here. The bill indeed states that the trustees executed to the plaintiff Sarah a certain deed of devolution and transference, whereby they conveyed to her the whole trust property as amply as they had held it for her use, and whereby they denuded themselves of their trust, and the feme plaintiff became entitled to receive the funds; but this allegation must necessarily be understood as charging only as full a devolution and transference as by their deed the said trustees could rightfully make. It was not in their power, by any instru-
[478] ment which they might execute, to transfer to the feme plaintiff so thoroughly and absolutely all the rights and authorities conferred upon them by the deed of settlement, as to leave them, in the contemplation of this Court, without a material interest in, and liability for, the property, the subject of contest. Under the deed of settlement, the enjoyment of the property is not only secured to the sole and exclusive use of the plaintiff Sarah, but every interference of her husband therewith is most strictly interdicted. This Court cannot allow an operation to their deed of transference which will put this property directly into the hands of the husband; and such would be the necessary result of a transference of the whole interest to her without the intervention of a trustee. But besides, there are certain contingent trusts for the benefit of the issue which the said Sarah may have, which trusts have been confided to

the said trustees, and which they cannot devolve upon others. The effect, and the whole effect, of this deed of devolution, as regards this suit, is a solemn acknowledgment by the trustees of their assent that the *whole immediate beneficial interest* in this property may be decreed to their co-plaintiff. We are therefore of opinion that this objection also will not avail the defendants.

The remaining objection is, for that the bill has made parties defendants thereto, not only the administrator *de bonis non* of Ann Charteris, but the executrix of the deceased administrator; that the latter is responsible, not to the plaintiffs, but to the administrator *de bonis non;* that the relief of the plaintiffs is direct against such administrator, and should therefore be sought against him only. This objection we think is clearly untenable, and, in support of that opinion, we rely on the authority of *Brotten* v. *Bateman* in this Court, 2 Dev. Eq. Repts. 115, and refer to the reasons assigned in that case, and also in the case of *Holland* v. *Prior*, 1 Mylne & Keene, 237, (7 Con. Eng. C. Rept. 22,) in both of which the very objection was deliberately considered and overruled.

There must be a reference to take the accounts required by the plaintiffs.

Per Curiam. Decree accordingly.

Upon the return of the report, made by the commis- [479]
sioner under the order of reference, to state the accounts in this cause, exceptions were filed, and, thereupon, the following Opinion was pronounced by his Honor

Gaston, Judge. The commissioner's report exhibits two views of the account directed to be taken in this case. If the plaintiffs be entitled to the moiety of the effects of John Charteris, which was bequeathed to his sister, Ann Charteris, the commissioner finds the amount due them to be $7,208 15; but if the plaintiffs be not entitled to that moiety, then he reports the amount due to be $5,798 37. The question of law, presented by the report, arises upon the following facts: John Charteris bequeathed all his property to his two sisters, Ann Charteris and Jane McDonald, with an express limitation, that if either of

them should die without a child, or children, living at her death, "the whole should survive to the surviving sister, her heirs and assigns." Ann Charteris died without having been married, but there was living, at her death, the plaintiff Sarah, who was born to her out of lawful wedlock, long before the execution of John Charteris's will, and who was recognized by the said Ann, and by her friends, as the child of the said Ann; and in whose favor the deed of settlement was made of all the property of the said Ann, which has been established in this cause. It is insisted, on the part of the plaintiffs, that the said Ann did, in the sense of this will, leave a child living at her death, and that therefore the limitation over to Jane McDonald did not take effect. The court has no difficulty in pronouncing that, according to the legal construction of the will, Ann Charteris did die without leaving a child or children living at her death, and that the limitation to the defendant, Jane, did take effect. This is not the case of a bequest *to* the children of the testator's sisters; much less to their children then in existence. It is a prospective disposition in favor of the surviving sister, upon the contingency that the other should not leave child or children behind her. Now, without deciding upon the effect of a bequest explicitly made to the children which a woman may have, whether legitimate or natural; or upon the effect of a
[480] limitation, in case a woman should not leave living at her death any child, whether legitimate or natural; it is enough to say, upon the present occasion, that it is perfectly clear that the word "children," *per se*, imports in law, legitimate children; and that none but legitimate children can be understood as embraced therein, unless, upon the instrument to be construed, it manifestly appears that natural children were thereby intended. (See *Wilkinson* v. *Adams*, 1 Ves. & B. 422.) Nor is this legal import of the term "children" at all altered by the acts of our legislature, which permit, where a woman dies intestate, and without legitimate children, "those commonly called illegitimate or natural children" to succeed to the property of their mother. They are not thereby made, in law, the children of their reputed mother, but enabled to take her property where there are none such, under the description of persons "commonly called illegitimate or natural chil-

dren." The court therefore sets aside the account taken by the commissioner, upon the basis that the plaintiffs are entitled to the moiety of the effects of John Charteris, bequeathed to his sister Ann.

Exceptions have been taken by the plaintiffs to the other account. The first exception is, for that the commissioner hath allowed a commission of five per centum to the executrix of Ronald McDonald, when, according to law, no commission should be allowed. So far as this exception extends to the allowance of any commission, it is not well founded, for it is one not allowed to the defendant Jane, *personally*, but to her testator, and is not forfeited, as alleged on the part of the plaintiffs, by the unconscientious resistance she has made to their just claims. But the rate of commission is manifestly unreasonable. The whole estate of Ann Charteris, with which the late R. McDonald is charged, consists of three sums of money—two received from Mr. Morehead, the administrator of John Lenox, and the other received from Mr. Town, a professional gentleman of Virginia, being the said Ann's one-third part of the net amount of collections there made for John Lenox's representatives: and there are no disbursements. The moneys thus received, simply remained in his hands until his death. The ground upon which the commissioner allowed this rate of commission was, that an order had been obtained in [481] the County Court of Rockingham, by the defendants, since the reference of the accounts, fixing 5 per cent. as a proper commission. Whatever respect this court might feel itself bound to pay to such an order, had it been made before this suit was instituted, it regards an order in relation to a matter under investigation *here*, as furnishing no criterion by which to regulate the proper allowance. The commissioner should have reported what he deemed a reasonable commission, and if there was ground to expect that any investigation to be made by him could change the view in which the subject of commissions is now presented, we should recommit the report for his revisal. But thinking it unnecessary to delay the final decision of the cause for the mere form of such a recommitment, we allow the exception for the excess over 1½ per centum, credited as a commission to Ronald McDonald, and overrule it

as to the residue. The remaining exception of the plaintiffs is, for that the master, in the said account, hath not charged the estate of Ronald McDonald, for the interest or profits on a moiety of the estate of John Charteris, up to the year 1830, when Ann Charteris died. In strictness, there is ground for this exception. Until the death of Ann Charteris, the estate of John Charteris belonged beneficially to the said Ann and Jane McDonald, equally; and, therefore, although upon the death of Ann Charteris her moiety of the estate survived to the said Jane, yet her moiety of the *profits* did not pass therewith. But the court will not recommit the report because of this exception. It is admitted that the claim was not advanced before the commissioner, and not thought of until after the report was made. It does not appear that there was, in fact, any profit on the estate, between 1827 and 1830; and it is certain, that if there was any, the moiety of the plaintiffs therein must have been very inconsiderable. For the *whole* estate, with the accumulation of interest thereon, for three years after the death of Ann Charteris, that is to say, in November 1833, appears to have been but $1,032.

The report, according to the second view presented by it, is to be corrected, by deducting the excess of commissions allowed to Ronald McDonald; and, after that correction, is con-
[482] firmed. The commissioner is allowed $25 for taking the accounts, to be included in the taxation of costs, and the plaintiffs will have a decree for the amount due them, and also a decree for their costs against Jane McDonald.

PER CURIAM. Decree accordingly.

NOTE.—As to the question whether an instrument is to be held a deed or a will, see *Henry* v. *Ballard*, 2 Car. Law Repos. 595, and *Branch* v. *Bird*, 4 Dev. Rep. 142. Upon the question of making the assignor a party in a bill by the assignee, see *Polk* v. *Gallant*, *ante* 395, and the Note thereto. See also *Carter* v. *Jones*, 5 Ired. Eq. Rep. 196; *May* v. *Smith*, Busb. Eq. Rep. 196.

That the word "children," in a devise or bequest, means only legitimate children, see *Kirkpatrick* v. *Rogers*, 6 Ired. Eq. Rep. 130. An illegitimate child may, however, take if such be the apparent intent of the testator. *Fairly* v. *Priest*, 3 Jones' Eq. Rep. 383. See also the Revised Code, ch. 64, sec. 5.

Upon the question of commissions, see *Peyton* v. *Smith*, *ante* 155, and the Note thereto on that subject.

The 20th section of the 119th chapter of the Revised Code enacts that "no will shall be effectual to pass real or personal estate, unless it shall have been duly proved and allowed in the probate court; and the probate of a will devising real estate shall be conclusive as to the execution thereof, against the heirs and devisees of the testator, whenever the probate thereof under the like circumstances would be conclusive against the next of kin and the legatees of the testator."

MEMORANDUM.

At a meeting of the Governor and Council, held at the Executive Office, on the 10th of Feb'y 1840, EDWARD HALL, Esq., of Warrenton, was appointed a Judge of the Superior Courts of Law and Equity, *vice* Judge SAUNDERS, resigned.

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ACCOUNT.

1. A series of consignments on one side, and of payments on the other, gives jurisdiction to a court of equity for an account, although one transaction would not be sufficient. *McLin* v. *McNamara*, 82.
2. The circumstance that a turnpike company were induced to lessen their rate of tolls in consequence of the encroachments and illegal acts of the defendant, might perhaps be taken into consideration in an action on the case at law, but will furnish no reason for an account in equity for receiving or abstracting the plaintiffs' tolls. *Buncombe Turnpike Co.* v. *Allen*, 115.
3. It is against the usage of the Court to act upon matters of account *originally*. They must first be referred to the Master for a report. *Peyton* v. *Smith*, 325.

See EQUITY, 6—EVIDENCE, 3—GUARDIAN AND WARD, 2, 3, 4—PRACTICE AND PLEADING, 2.

ADMINISTRATORS.—See EXECUTORS AND ADMINISTRATORS.

AGENT AND PRINCIPAL.

1. An agreement whereby an agent is constituted to recover property by legal process, and is to receive one-half for his compensation, is infected with champerty, and will not be aided in equity. And upon a subsequent contract for the sale of the interest of the principal to the agent, it must appear that the agency was at an end when it was made, and that the agent had, in all things, acted with good faith, before assistance will be rendered to him. *Slade* v. *Rhodes*, 24.
2. In a bill by a principal, to have certain conveyances of land and slaves made by one purporting to act as his attorney, declared void, surrendered and cancelled, for want of authority in the attorney to act for him, it is unimportant to the defence, whether the plaintiff made to the agent a formal letter or not, provided it sufficiently appear that he otherwise gave him authority to contract in his name for the conveyance of the land and slaves; though such a letter of attorney would be requisite to impart validity to the deeds, as legal instruments. *Pickard* v. *Brewer*, 428.
3. Any written, or even parol authority, to an agent to make sale of slaves, will be sufficient; because it is an act which may be done without deed, and, therefore, the authority to do it may be without deed. *Ibid.* 428.
4. The fact of an authority having been conferred, and a formal letter of attorney made, by a principal to his agent, for the purpose of submitting certain matters of controversy in relation to land and slaves to arbitration, and making conveyances pursuant to the award, held to be established upon the evidence furnished by the principal's letters and declarations, and by other testimony, contrary to the positive allegations of his bill, and notwithstanding the inability of the defendant to produce the letter of attorney. *Ibid.* 428.

AGREEMENTS.

1. An agreement entered into with a weak old man, by which he makes an absolute assignment of his whole estate upon the consideration of the assignee's personal covenant to maintain him for life, out of the profits of the estate, is, of itself, without reference to any confidential relation between the parties, or to any state of anxiety and alarm in which the assignor may be, liable to much animadversion, and, without explanation, imports undue advantage. *Buffalow* v. *Buffalow*, 241.
2. It is a mark of fraud that the assignee, in a grossly unequal agreement made between persons standing in a confidential relation to each other, alone gave directions to the counsel who drew the instruments, and that the assignor had no opportunity of consulting or advising with the counsel. *Ibid.* 241.
3. The validity of an agreement does not, in ordinary cases, depend on each or either of the parties having an attorney, nor is the intervention of any third party ordinarily requisite. But, in a suspicious agreement between a shrewd man on the one hand, and a very weak one on the other, the counsel who is called upon to draw the instruments ought to have an opportunity to see the weak man, receive his directions, or, at least, understand his situation and views, and provide properly against advantage being taken of him, and for the permanent security of his rights under the agreement. *Ibid.* 241.
4. An agreement between one entitled absolutely to one-half of certain chargeable slaves, a woman and children, and for life as to the other half, and the remainder-man, that upon the latter's assenting to the sale of the slaves by the former, he should have one-half of the purchase money, is not inequitable, and will not be set aside. *Watson* v. *Ogburn*, 353.

See COVENANT, 2—INDEMNITY, 1—PARTITION, 7.

AMENDMENT.

1. After the parties have been at issue five years, an amendment to the bill will not be permitted, which involves the necessity of additional proofs, when the answers gave the plaintiff notice of the defence which he seeks to avoid. *Tomlinson* v. *Savage*, 68.
2. Upon a prayer for an amendment which amounts to framing a new bill, and taking new proofs, the course is to dismiss the pending bill without prejudcie. *Ibid.* 68.

ANSWER.

When the answer of an administrator neither admits nor denies assets, there must be an inquiry and report as to the amount of assets in the defendant's hands, unless he waive such inquiry, before the plaintiff can have a decree. *Dumas* v. *Powell*, 122.

See DECREE, 2.

APPOINTMENT.

1. Where the slaves of a feme sole were, upon her marriage, agreed to be settled upon the intended husband for life, and in default of issue subject to a power of appointment in the wife by writing in the nature of a will, and the wife died having made an appointment and an executor, and a creditor of hers obtained one judgment against the husband for her debt, and another judgment for a different debt against her executor, and at the sheriff's sale first purchased the interest of the husband under

the judgment against him, and then that of the wife under the judgment against her executor, he has, in equity, only an estate for the life of the husband, and as the amount which he bid for that, extinguishes *pro tanto* the first debt, he cannot hold the slaves against the voluntary appointee of the wife, until it is paid. But he has a right to hold the slaves as a security for the latter judgment, because under it he got nothing. *Smith* v. *Garey*, 42.

2. The executor of a writing in the nature of a will, made by a feme covert under a power, takes no interest in the property subject to it: but it vests, without his assent, in the appointee. *Ibid.* 42.

ASSETS.—See EXECUTORS AND ADMINISTRATORS, 17, 18, 24—RETAINER.

ASSIGNMENT.

1. The assignee of a bond without notice, who took it before it fell due, as a security for a pre-existing debt, without paying anything for it, or impairing his original debt, in consideration of the assignment, is not a purchaser so as to protect himself against an equity, subsisting in favor of the obligor, to have the bond cancelled. *Holderby* v. *Blum*, 51.

2. Where neither of two assignees has the legal title, their respective rights are governed by the priority of their assignments; and where a debtor placed bonds and accounts in the hands of an agent, and directed him to pay certain debts from his collections, and solicited and procured from the creditors their acceptance of this security, and afterwards assigned all his debts to a trustee for the benefit of other creditors, it was held that the trustee took only the residue left after payment of the debts mentioned in the directions to the agent. *Lindsay* v. *Wilson*, 85.

See CREDITORS, 2, 3—PARTIES, 2, 3—SURETY AND PRINCIPAL, 12.

ATTORNEY.

The principle upon which Courts of Equity interfere, in cases of unequal agreements between attorney and client, extends equally to agreements between a party to a suit before a single magistrate before whom attorneys do not appear, and his friend and confidential adviser in such suit. Hence, an absolute conveyance of all his property, worth at least $1000, upon the consideration of supporting him during his life, obtained by a nephew from his uncle, a weak and very infirm old man, upwards of sixty years of age, while the nephew was acting as the pretended friend, adviser, and agent of the uncle, in a suit brought by warrant before a single magistrate, to recover from him the penalty for trading with slaves, about which the uncle was under much anxiety and alarm, and obtained too without the old man's having an opportunity to consult his friends or advise with counsel, will be set aside, and a re-conveyance decreed upon the payment to the nephew of what had been advanced by him. *Buffalow* v. *Buffalow*, 241.

See AGENT AND PRINCIPAL, 2, 3, 4.

AWARD.

Whether an award fairly made by an arbitrator can be annulled, because a fact which existed was not communicated by one of the parties to the arbitrator or to the opposite party, when the person in whose favor the award is had not undertaken to state the whole case, but the award was made upon a case agreed by counsel. *Quere?* *Speight* v. *Speight*, 280.

BEQUEST.

1. Where a testator directed his property to be kept together, and his family supported out of it, under the government of his wife, and that no expenses should be charged to his children while they remained at home, and that his sons should in the final division of his estate account for expenses they might incur after leaving home to acquire professions, and that an equal division should be made when his youngest child attained full age—*held*, that a daughter who left the family after she attained full age, was not entitled to maintenance. *Manning* v. *Woff*, 11.
2. A residuary bequest, "to my six brothers and sisters, and to their respective heirs of their bodies, but no further, and these must be living at the death of my wife," held to mean that the brothers and sisters were to take if they were then living; if not, then that their children were substituted legatees, excluding their grandchildren. And a direction to his executors to exclude from the division such as should not claim within five years after advertising the death of the widow, and to divide it equally between those applying, was held to make a joint tenancy so as to prevent a lapse by the death of any of the residuary legatees. *Vaughn* v. *Dickens*, 52.
3. Where a testator, for the purpose of paying his debts and schooling his children, created a fund arising from the sale of his goods, the obligations due to him, and certain other claims, and then directed that his negroes at a certain period should be divided between his son and daughter, two-thirds to the son and one-third to the daughter, and that the hires of the said negroes should be divided in like manner, *it was held*, that the son took two-thirds of the negroes and their hires only, and that the property composing the fund for the payment of debts and schooling the children, not wanted for those purposes, was given equally to the son and daughter (who were the only children) by implication, or was undisposed of by the will, and therefore was to be equally divided between them as next of kin. *Graham* v. *Davidson*, 155.
4. Where a testator directed that his infant grand-son and grand-daughters, who were orphans with but little property, should "be raised and taken care of" by their uncle; that the grand-son should "have, at the age of twenty-one, a small negro boy, and a horse and saddle worth $75; and be educated so as to understand and know the English, Latin and Greek languages; and after this far learned, to be got to the study of the law, if capacity will allow of it;" and that the girls should "be educated so as to read and write;" *it was held*, that the direction in the will created a charge upon the testator's estate for the support of the grand-son during his minority, and for his education at the common grammar schools or academies of the country, but not for sending him to College, or supporting him during the time he might be studying the law, or any other profession; and that the testator did not mean to maintain his grand-daughters absolutely until full age or marriage, but intended to provide for the expenses of their tuition, board and clothing up to the age at which young women in the same station are deemed capable of providing for themselves, or of rendering such services in the paternal household as will compensate for their maintenance. *Cloud* v. *Martin*, 274.
5. Where a testator gave to his friend H. D. certain slaves "in trust for the

support and maintenance of his daughter M. E. A., with an equal share of the proceeds of the sale of property which he should empower his executors to sell, with the exception of $500, to be taken out of the part of his daughter, of the money that might remain after paying his debts," and, after giving certain other slaves to his wife, and her children, and directing what property was to be sold, concluded as follows: "after the payment of my just debts, the surplus, if any, I wish to be equally divided between my wife and her children, and the part which I design for my daughter, with the exception of $500 aforesaid, to my friend H. D., as aforesaid in trust, for the support and maintenance of my daughter M. E. A. The property I hereby leave in trust, for the benefit of my daughter M. E. A., is to be applied at the discretion of the trustee, for the support and maintenance of M. E. A. and her children; and no part or parcel thereof to be subject to the debts of her husband." *It was held*, that the $500 was taken out of the daughter's share, and went to increase the balance or "surplus" that was to be divided between the testator's wife and children; and that the bequest in favor of the daughter was given to her sole and separate use *for life*, and after her death, in trust for her children. *Ponton* v. *McLemore*, 285.

6. Where a testator, in the first clause of his will, gave certain slaves to his wife for life, and afterwards to his children, "to be equally divided between them, share and share alike," and, in a second clause, gave his children "all the balance of his estate, to be equally divided among them, share and share alike—and in case either one of his children should die, before it arrived at lawful age, and leaving no child or children, then his or her share to be equally divided among the surviving ones;" *it was held*, that upon the death of one of the children, *all* the property bequeathed to such child by the will, and not the "balance of the estate" only, mentioned in the second clause, went to the survivors, particularly as the testator, in a subsequent clause, declared, that by the expression "shares of his children," he meant all that they took under his will. *Pettway* v. *Powell*, 308.

7. Where a legacy is given to a described class of individuals, as to children, in general terms, and no period is appointed for the distribution of it, the legacy is due at the death of the testator; the payment of it being postponed to the end of two years after that event merely for the convenience of the executor in administering the assets. The rights, therefore, of legatees, are finally settled and determined at the testator's decease. Hence, children in existence at that period, or legally considered so to be, are alone entitled to participate in the bequest. And it makes no difference in the application of the rule, although the terms of the bequest be prospective, as to children begotten or *to be begotten*, and no particular time of payment is mentioned, or where the gift is general to children, with a condition annexed to it, disposing of a child's share upon his dying under the age of twenty-one years; for the fund will nevertheless be divisible at the testator's death, which necessarily excludes afterborn children. *Ibid.* 308.

8. A child in *ventre sa mere* will take a share in a fund bequeathed to children, under a general description of "children." *Ibid.* 308.

9. Where a testator devised and bequeathed all his estate, consisting of land, slaves and perishable property, such as household furniture and live stock,

to his wife for life, and then proceeded, "and at the death of my wife, the property then remaining to go to my son A. H. And provided he should be then dead, to go to his lawful heirs, if any; and provided the said A. H. should die before his mother, and die childless, then the remaining property, after the death of my wife, to be sold, and to be applied" to certain specified purposes; *it was held*, that the wife took but a life-estate in the land and slaves, that the son did not take a vested but only a contingent interest in this property, and that upon the death of the son, in the life-time of his mother, leaving children, the children took such an interest in the slaves as entitled them to apply to a Court of Equity to restrain the tenant for life from selling the slaves out of the State, and to compel her and her vendees to give security for the forthcoming of the slaves at her death. *Hales* v. *Griffin*, 425.

10. In a considerable class of cases, a devise or bequest of *what shall remain or be left* at the decease of the prior devisee or legatee, has been held to be void for uncertainty. But where a part of the property comprised in such a gift, consists of household furniture, or other articles of a perishable nature, these words may fairly be considered as referring to the use and wear by the first taker. Such would be the construction, if it were limited to him expressly for life; and indeed there is not any case in which such expressions have been held to render the gift void, where the interest of the first taker was so limited for life. *Ibid.* 425.

11. Where a testator bequeathed as follows: "I lend unto my son A. W. and my son-in-law A. S., in trust for the only use and benefit of my daughter B. P., during her natural life, against the claims or control of her present or future husband, the following negroes, &c. My will and desire is, that the negroes left to my son A. W. and A. S., in trust, for the use and benefit of my said daughter B. P., against the claims or control of her present or future husband, during her natural life, shall be equally divided amongst the heirs of her body forever, but for want of such, my will and desire is, that the said negroes be equally divided amongst my other children and their representatives:" *It was held*, that the limitation of the slaves to the daughter for life, in the first clause of the will, was of the *equitable* interest only; that the legal estate in the trustees was but coextensive with her life-estate; that the second clause of the will contained a limitation of the *legal* estate to the heirs of her body, after her death; that the two estates being of different natures, one equitable and the other legal, could not unite; and therefore that the daughter, Mrs. P., took under the will of her father, only a life, instead of an absolute, interest in the said slaves. *Payne* v. *Sale*, 455.

12. The extent of the legal estate given to trustees in a will, where the words are not too strong to be thereby controlled, may be collected from the trusts declared upon it. *Ibid.* 455.

See DEVISE, 3—LEGACY—LIMITATION.

BOUNDARY.

A Court of Equity will not entertain a bill to settle boundaries, except in cases in which the boundaries were once certain, and were rendered uncertain by the default of the defendant, or those under whom he claimed; and where there was either an agreement that the land of the several parties should be distinguished, or some relation between the parties,

which made it the duty of one of them to preserve the landmarks, and therefore the boundaries became confused, by the neglect or fraud of the party charged with that duty. *Hough* v. *Martin*, 379.

CASES APPROVED.

Baker *v.* Carson, ante, vol. 1, p. 381. *Albea* v. *Griffin*, 9.

Donaldson *v.* Bank of Cape Fear, 1 Dev. Eq. Rep. 103, and Harris *v.* Horner, ante, vol. 1, p. 455. *Holderby* v. *Blum*, 51.

Cannon *v.* Jenkins, 1 Dev. Eq. Cas. 427. *Wynns* v. *Alexander*, 58.

Ballenger v. Barnes, 3 Dev. Rep. 460, and Blount *v.* Porterfield, 2 Hay. Rep. 161. *McLin* v. *McNamara*, 82.

Simms *v.* Garrott, ante, vol. 1, p. 393. *Dicken* v. *Cotton*, 272.

Brotten *v.* Bateman, 2 Dev. Eq. Rep. 115. *Thompson* v. *McDonald*, 463.

CHAMPERTY.—See AGENT AND PRINCIPAL, 1.

CHILDREN.

The word "children," *per se*, imports in law, legitimate children, and none but legitimate children can be understood as embraced in an instrument providing for "children," unless it manifestly appear that natural children were thereby intended. Nor is the legal import of the term "children" at all altered by the acts of our Legislature, (see 1 Rev. Stat. ch. 38, rule 10, and ch. 64, sec. 4,) which permit, where a woman dies intestate, and without legitimate children, those commonly called illegitimate or natural children, to succeed to the property of their mother. *Thompson* v. *McDonald*, 463.

See BEQUEST, 8—LIMITATION, 2.

COMMENCEMENT OF SUIT.—See EQUITY, 5.

COMMISSIONS.—See EXECUTORS AND ADMINISTATORS, 5, 22, 23, 27, 28, 31, 32, 33, 34, 35, 36, 37, 39, 48, 51, 53, 54. REFERENCE AND REPORT, 7.

CONSTRUCTION.

There is always difficulty in the court of any country undertaking to fix the construction of an instrument made in a foreign land, with the laws of which it is not familiar. The only mode of encountering that difficulty, where there is not an allegation established by proof that the instrument has a technical meaning different from that which its words import in *their ordinary sense*, is to understand the instrument according to its obvious import. *Thompson* v. *McDonald*, 463.

See DEED, 2—MARRIAGE SETTLEMENT, 2, 4—WILL, 1.

COSTS.

1. Where the *cestui que trust* incurs costs at law, in defending a title purely equitable against his trustee, without coming at once into the proper forum for redress, he cannot in equity recover his own costs expended at law, but he will be reimbursed the costs paid to the trustee in the suit at law. *Murphy* v. *Grice*, 199.
2. This Court is not disposed to review a decree upon the question of costs alone. *Green* v. *Crockett*, 390.
3. Costs may be given against a trustee as well as his *cestui que trusts*, when they claim adversely to the plaintiffs, and deny his right altogether. *Ibid*, 390.
4. The costs incurred by the defendants in a suit in equity, brought by a party claiming under a supposed will, against the executors, who claimed for themselves adversely to the plaintiffs under the same will, cannot be

allowed the defendants, in a suit against them for an account, brought by the administrator of the deceased, after the recall of the probate of the said will. Nor can the cost of resisting the proceedings to recall the first probate and attempting to obtain a second, be so allowed; for although an executor, acting entirely or mainly for the benefit of other persons provided for in a supposed will, ought to be protected from loss by a faithful, or what was properly deemed a faithful, effort to carry into effect the apparent will, yet where the executor is solely, or almost solely, interested under the will, he is to be taken as acting for himself, and if he fail, must pay the costs of the litigation. *Ralston* v. *Telfair*, 414.

COVENANT.

1. A party taking under a deed, is bound to do what in the deed is required of him; but if the deed be not executed by him, it is not an obligation under his seal, and an action of *covenant* will not lie against him for a breach of it. *Benbury* v. *Benbury*, 235.

2. Where a testator gave all his estate, both real and personal, to his wife for her life, and afterwards to his son and two married daughters, and to the survivors or survivor of them, in case either of them should die in the lifetime of his widow, without children, but to his or her children if he or she should so die, leaving children to survive his widow; and after the death of the testator, certain lots, belonging to his estate, in the City of New York, were diminished in value by the widening of the streets in that City; whereupon assessments were made upon certain other city property to repair the injury so sustained by said lots, and the money so assessed paid into the treasury of the corporation for the use of the owners of the lots; and afterwards the widow of the testator, his son, and the husbands of his daughters, made the following agreement under their respective seals in relation to the said assessments, to-wit: the widow agreed to "relinquish to the other parties all her right and interest in said money, so that it might be received by the other parties thus:" the son one third, and the husbands for themselves and their wives each one-third; and after a similar covenant on the part of the son, each of the husbands covenanted respectively "with the other parties (for the use of his wife or of any other person or persons who may hereafter become entitled to the money received by him,) that upon the happening of any contingency whatsoever, that vests a right to receive said money by him received from the estate of the testator, he will repay the same or cause it to be done, but without interest until the contingency happens;" and it was stated to be "the true agreement of the parties, that the widow surrendered her interest in said money, without prejudice to the rights and interests of all the persons;" and that the covenants should be "construed for the benefit of the wives, unless they choose to execute a release in due form of law to discharge their right under this deed:" *It was held*, that upon the death of one of the husbands, insolvent, it was unnecessary to decide whether the share of the said money, which, under his directions, had been placed to his credit in bank, was real estate under the law of New York, and therefore his widow and children entitled to it as such, for that, if considered as personal estate, his widow and children were entitled to it under his covenant in the agreement, and were his specialty creditors to that amount, and that the other husband, who was his execu-

tor, should retain the assets of his testator, to the amount of their claim, against the other specialty creditors. *Daves* v. *Haywood*, 313.

CREDITORS.

1. Where a testator by his will gave to his two sisters all his land, "together with all cattle, horses and other appurtenances thereto, except so much thereof as will pay my just debts; which I think may be done from the growing crop;" and afterwards gave all his negroes to the same persons, it was held that the will did not create a charge upon any part of the property for the benefit of creditors, over and above that which the law affixes upon the whole personal estate. *Hines* v. *Spruill*, 93.
2. In a bill of interpleader by the assignee of a legatee, in trust for the payment of specified debts, against his *cestui que trusts* and the creditors of the testator, as both sets of defendants are actors, it is necessary that the latter should have established their debts at law. And in a contest between them, the executor should be a party; as should all persons claiming a joint interest in the subject-matter of the legacy. *Ibid.* 93.
3. The general creditors of a decedent have no lien upon his assets in the hands of an assignee of a legatee, unless by force of some rule of equity, which charges him on account of fraud, trust, or the like. *Ibid.* 93.
4. Difference between charging personal property and land with the payment of debts: in the first case, as the creditors can subject *all* the personalty, the question is solely between legatees for an exoneration. In the second, the devise of the land is in trust for the creditors, and they have a specific lien. *Ibid.* 93.
5. When a debtor has been discharged under the act for the relief of insolvents, so that his body cannot be again taken in execution for the debt, any *choses in action* or other property not subject to an execution at law, which he may afterwards acquire, may be reached in equity; for the statute having declared that no execution shall be again issued against the body of the discharged debtor, but that one may issue against "any estate" which he may subsequently acquire, it is the duty of the Court of Equity to provide a remedy for the creditor when the estate of the debtor is of such a nature that it cannot be reached by an execution at law. *Brown* v. *Long*, 138.
6. Any equitable property of a debtor may be reached in equity by a creditor, provided it would be subject to execution if the equitable interest of the debtor were the legal interest in possession. *Ibid.* 138.
7. But whether generally *choses in action* may be so reached by a creditor in all cases where execution cannot be done on visible and tangible estate of his debtor. Qu? *Ibid.* 138.

CROPS.

Crops growing on land not devised, go to the executor and not to the heir. *Bradshaw* v. *Ellis*, 23.

See DEVISE, 3.

DECLARATIONS.—See SATISFACTION, 2.

DECREE.

1. A decree which passes against an executor *in invitum*, is, unless impeached for fraud, conclusive upon the residuary legatees; but where it is by consent, it is subject to re-examination, and has no obligation unless proved to be just. *Lamb* v. *Gatlin*, 37.

2. If an answer be directly responsive to the material facts charged in the bill, and be clear, precise and positive in its denial of them, and be not disproved or discredited in this part by what is found in any other part of it, the testimony of a single witness, where there is no circumstance to corroborate it, will not be sufficient to entitle the plaintiff to a decree; especially if the testimony of such witness be equivocal or evasive. *Speight* v. *Speight*, 280.

See TRUST, 2.

DEED.

1. Although the motive assigned for the execution of an instrument, to-wit: the desire of removing strife about the enjoyment of the property after the death of the maker—the disposition attempted of property that might be acquired thereafter, and before death—and the injunction on trustees named therein, to pay death-bed and funeral expenses—may unequivocally point to the death of the maker, as a period after which some at least of his purposes are to be executed, and are indications of the testamentary character of the instrument; yet they are by no means conclusive. It does not follow, because an instrument is to produce important results after death, that therefore it must be testamentary. To render it so, it is essentially necessary that it should be made to *depend* on the event of death as *necessary to its own consummation*. And therefore, if the instrument, notwithstanding the above-mentioned indications of a testamentary character, be in *form* a deed; if it do not use a word of a gift after death—of devise—or of bequest; if it import a present disposition of property to the persons therein named as trustees, "with power" to them "to sell and dispose of said estate, bring actions, &c., and generally to do every thing in the premises that" the maker "could have done before the granting" thereof; and if the maker reserve his "own life-rent in the premises, and power to alter, innovate or revoke these presents, in whole or in part, at any time hereafter," it will be held to be a deed, and not a will or testament. *Thompson* v. *McDonald*, 463.
2. Although it does not necessarily follow, that if an instrument be not testamentary it must have effect as a deed, and although a declaration by the Court that it cannot operate as a deed may consist with the established fact of the maker's intestacy; nevertheless, this fact is one which should render the court cautious, in giving the instrument a construction that must render it nugatory; for it is the duty of courts to be benignant in the interpretation of solemn and deliberate acts, so that they may avail, if possible, rather than perish altogether. *Ibid.* 463.

See AGENT AND PRINCIPAL, 2, 3—DISCOVERY.

DEVISE.

1. Two different tracts of land a half mile apart, which were cultivated by a testator together, as one farm, will both pass by his will, under the description of "my plantation." *Bradshaw* v. *Ellis*, 20.
2. Where a testator directed all his property to remain on his plantation, under the care of his wife, until his youngest son should attain full age; and then gave the plantation to that son and another, the wife takes by implication a term in the plantation during that period. *Ibid.* 20.
3. In a devise of a certain farm and "all stock on the same," the words "all stock" will comprehend only the animals used with, supported by, or

reared upon the farm, and will not include the plantation tools and the gathered crop that may be on it. *Graham* v. *Davidson*, 155.

4. The word "property" is equivalent to "estate" in its operation to pass the interest in land as well as the land itself, and land will pass in a will by either of those words. *Foster* v. *Craige*, 209.

5. The construction of devises of legal interests in land is a legal question, and belongs to the tribunals of the law, and not to those of equity; and the obscurity of the will furnishes no sufficient reason for applying to equity; for, if the obscurity be not so great as to render the disposition altogether unintelligible, the devise will be valid at law, so far as it can be understood; and if it be so vague and uncertain as not to amount to a designation of any *corpus*, it necessarily follows that no court can help it, but that it must be ineffectual. *Hough* v. *Martin*, 379.

See BEQUEST, 9, 10.

DISCOVERY.

In a bill for the discovery and production of deeds it is absolutely necessary to charge that the deeds have come to, or are in, the hands of the defendants. It is not sufficient to state that a certain person had some deeds in his hands, without describing them, and that he died and made some of the defendants his executors, and others his devisees, without any allegation that any deeds for the land claimed by the plaintiff, or material to him in the controversy, have come into the custody, or under the control of the defendants. *Hough* v. *Martin*, 379.

See INDEMNITY, 2.

DIVORCE.

The Supreme Court has only appellate jurisdiction of a suit for divorce when brought in the Court of Equity, as well as when brought in the Superior Court of Law, under the Revised Statute, "concerning Divorce and Alimony," 1 Rev. St. ch. 39. *Holloman* v. *Holloman*, 270.

EQUITY.

1. Where many persons are jointly entitled at law to a large number of slaves held by many different claimants, they may have relief in equity upon the bill of some in behalf of the rest, upon the principle of preventing a multiplicity of suits. *Vann* v. *Hargett*, 31.

2. Although a plaintiff, before he can come into equity to prevent a multiplicity of suits, ordinarily must establish his title at law, yet this rule will be dispensed with where he cannot recover at law by reason of a technical objection—as the number of parties—his ignorance of their names, and the like. *Ibid.* 31.

3. Notwithstanding it is a rule in equity, that all persons having an interest in the subject-matter of a suit must be parties to it, yet this rule is of necessity dispensed with, if they are unknown. *Ibid.* 31.

4. A Court of Equity has no jurisdiction to declare a deed void, because of the infancy of the grantor; the remedy at law being plain and direct. *Burkhead* v. *Colson*, 77.

5. A suit in equity is commenced when the bill is filed, and not when the subpœna is issued. *McLin* v. *McNamara*, 82.

6. Although it be admitted, that by actions of trover, assumpsit or account, an administrator, after the recall of the probate of a supposed will, might have remedy at law against one who acted as executor under it, yet

equity has jurisdiction to decree an account in such case, as being a more complete remedy, and that particularly where a part of the plaintiff's demand is of such a nature that there is no jurisdiction at law; and in such suit in equity, the defendant will be treated as an executor or trustee, and made chargeable with what came to his hands of the trust fund, and also with such part thereof as he may have released or disposed of for purposes of his own; and he must make good what may have been lost by his bad faith, or gross neglect; and he will be entitled to be credited with all sums paid in discharge of debts owing by the deceased; and for all payments of legacies under the supposed will, made before he had a reasonable ground of belief that the paper was not a will, as it purported to be; and he will also be entitled to a fair compensation for his services done to the estate in the administration of it. *Ralston* v. *Telfair*, 414.

See BOUNDARY—CREDITORS, 5, 6, 7—DEVISE, 5—EXECUTORS AND ADMINISTRATORS, 52—LUNATIC—WILL, 2.

EQUITY OF REDEMPTION.

An equity of redemption in a mortgage of slaves or other personal property, is not in law subject to an execution, the act of 1812 (1 Rev. Stat. ch. 45, sec. 5,) extending to the equity of redemption in lands only. *Whitesides* v. *Williams*, 153.

EVIDENCE.

1. The entries in the books of a firm are *prima facie* evidence as between the partners. Knowledge of them is presumed, and evidence is required to rebut such presumption. *Philips* v. *Turner*, 123.
2. Evidence will not be received to show a parol agreement contradictory to, or varying from, a written agreement made at the same time, when no reason is assigned why the former was not incorporated into the latter. *Parker* v. *Vick*, 195.
3. In a suit for an account, if the plaintiff examine the defendant before the master, upon a reference to him, and read his examination on the hearing, the answers to the interrogatories, so far as they are responsive thereto, will be evidence for the defendant, though subject to contradiction, upon the same principle that his answer to the bill is evidence for him. *Chaffin* v. *Chaffin*, 255.
4. When the plaintiff avers one agreement, and the defendant sets up another, as to terms upon which a sheriff's deed was made to the defendant, and *either* may consist with the fact, if the sheriff were not a party to the agreement between the plaintiff and defendant; the proof of it by parol will not violate the rule which forbids parol evidence to be received to contradict or explain a written instrument. *Lyon* v. *Crissman*, 268.
5. Proof that a husband represented that certain money which he advanced for the purchase of a tract of land, was part of the separate estate of his wife, is competent to establish the fact that it was the wife's money, against one claiming as a purchaser at an execution sale against a third person—*Aliter* if the claim had been under an execution sale against the husband. *Pearson* v. *Daniel*, 360.
6. A husband cannot, in any way in which a bill may be framed, be a witness for his wife, in respect of property settled to her separate use; for the rule of equity as well as of law, forbids husband and wife to be witnesses for or against each other. *Ibid.* 360.

See EXECUTORS AND ADMINISTRATORS, 49—SATISFACTION, 2.

EXECUTION.

A purchaser at a sheriff's sale, even when the defendant in the execution has the legal title, and much more when he has but an equity, succeeds only to the defendant in the execution, and is affected by all the equities against him. *Polk* v. *Gallant*, 395.

See CREDITORS, 5, 6, 7—EQUITY OF REDEMPTION.

EXECUTORS AND ADMINISTRATORS.

1. The acts of 1723 and 1794, (1 Rev. Stat., ch. 46, sec. 11 and 12,) directing the mode of selling the personal property of decedents, is merely directory, and does not affect the power of sale vested in the executor by the common law. It should however always be followed, as, in the absence of fraud, it is a complete protection to the executor. *Wynns* v. *Alexander*, 58.
2. To entitle an administrator to the benefit of the act of 1789, (1 Rev. Stat. ch. 46, sec. 16,) advertisement of his qualification, at the court house door, is necessary, and is not supplied by publication in a newspaper printed in the county. *McLin* v. *McNamara*, 82.
3. When two co-executors make a joint return of inventories and accounts of sales, either will be answerable for what appears thereon, if he do not show what came to the hands of the other alone. *Graham* v. *Davidson*, 155.
4. Where an executor returns an inventory of debts due the estate, without stating them to be desperate or doubtful, he will be held responsible for them, unless he can show that there were set-offs against them, or that the debtors were insolvent so that the debts could not be collected. *Ibid.* 155.
5. An executor cannot claim commissions upon his disbursements, if it appear that he has been allowed them upon the amount of the estate, and the court deem that allowance sufficient for his trouble and services. *Ibid.* 155.
6. A debt returned in one inventory without comment, will not be charged against the executor, if in a subsequent one, it be stated that the same was believed to have been paid to the testator, and the debt appears to have been due several years prior to the testator's death, and withal was barred by the statute of limitations. *Ibid.* 155.
7. Interest, according to the usage of our courts, follows debt as its ordinary attendant, and is to be charged against an executor in his account without showing that he made interest or used the funds himself. And an executor in this State will be charged with interest on notes and other debts from the time they become due, and upon sales from the expiration of the time of credit, up to the settlement of the estate, if no interest account were kept to show that less interest was in fact received. *Ibid.* 155.
8. In calculating interest upon payments made by an executor, consisting of a great number of small items, the commissioner may ascertain the amount of each year, and allow interest thereon from the middle of that year. *Ibid.* 155.
9. Where the same person is both executor of an estate and guardian of the legatees, it is proper in his accounts as executor and guardian, to credit him in the first and charge him in the second, with a legacy given to his ward. *Ibid.* 155.
10. Where a testator, after several devises and bequests, concluded thus: "The balance of my *property* to be applied to the payment of my just debts.

Should there be a surplus, it is my will and desire that it be equally divided among the heirs of my deceased brother S. F. and the heirs of D. C."—*It was held*, that as the "property" mentioned in the will was a mixed fund of real and personal estate, and was to be applied in the first place to the payment of debts, the executors had a power by implication to sell a tract of land not specifically devised, for the payment of debts and for distribution. *Foster* v. *Craige*, 209.

11. Where there is in a will, a general direction to sell lands, but it is not stated by whom the sale is to be made, there, if the produce of the sale is to be applied by the executors in the execution of their office, a power to sell will be implied to the executors. *Ibid.* 209.
12. If a testator simply directs the distribution, among certain objects, of an unmixed fund arising from the sale of land only, then the heir alone can sell. *Ibid.* 209.
13. Where an administrator takes possession of the effects of his intestate, and dies, and administration is granted upon *his* estate, and more than seven years afterwards administration *de bonis non* is taken upon the first intestate's estate, the act of 1715, 1 Rev. Stat. ch. 65, sec. 11, will not bar a suit, at the instance of the administrator *de bonis non*, against the representative of the first administrator, for an account of the estate of the first intestate which came to the hands of his first representative. *Salter* v. *Blount*, 218.
14. The act of 1715, 1 Rev. Stat. ch. 65, sec. 11, barring creditors after seven years, does not extend to legatees. *Ibid.* 218.
15. The act of 1789, 1 Rev. Stat. ch. 65, sec. 12, will not protect the executor or administrator, even against a creditor, unless such advertisement be shewn to have been made as the act requires. *Ibid.* 218.
16. No time short of twenty years has ever restrained Courts of Equity from enforcing an account in favor of a legatee against an executor or his representatives. *Ibid.* 218.
17. In the view of a Court of Equity, all debts are of equal dignity, because all debts are equally due in conscience. But it is not so at law; and a Court of Equity, in decreeing payment by an executor or administrator of a debt of his testator or intestate, must respect the order of preference established at law, for, otherwise, it might compel him, who is liable only by reason of the assets in his hands, to pay the debt of the deceased out of his proper goods. *Benbury* v. *Benbury*, 235.
18. When an executor returns an account of sales in which he sets forth, besides the property the amount of sales whereof is stated, several lots of corn, cotton, &c., as being sold at the same time, with the prices *per* bushel or pound stated, but without giving the quantity of any one of them, or carrying out their amount in money, a commissioner, in taking an account of the estate, cannot reject these articles; but should call upon the executor, upon whom the burthen of proof is thrown in such case, for explanation in regard to them; and, if none be afforded, should charge him with an amount making the assets at least equal to the disbursements. *Nichols* v. *Dunn*, 287.
19. Where an agreement was made between an executor and D. M., that the latter should take possession of certain slaves belonging to the testator's estate, and keep them until the executor should be called upon for them

and their hires by the person entitled thereto, and should indemnify the executor from all loss on account thereof; and the executor stipulated, that if so saved harmless, he would not, as executor or otherwise, have any further claim to said slaves, and moreover relinquished to D. M. all the right which he had, as executor, to them, *it was held*, that the commissions allowed to the executor in his account with the persons entitled, for collecting the hires of the slaves while in the possession of D. M., belonged to the latter; but that he was not entitled to the commissions allowed the executor for selling said slaves as commissioner under a decree of Court. *Burroughs* v. *McNeil*, 297.

20. Executors and administrators are chargeable with interest on balances in their hands, whenever those balances have accumulated beyond the exigences of administration, unless it appears that the fund has been kept *sacred* and *intact* for the *cestui que trusts*, as their property, ready to be delivered over to them, so that profits could not have been made thereof. *Peyton* v. *Smith*, 325.

21. A clause in a will, giving "full power and authority" to the executors to dispose of any part or all of the property devised or bequeathed, which they might think best, and from time to time make distribution among the wife and children of the testator, does not enjoin upon the executors the duty of putting out the balances in their hands, from time to time, for the purposes of accumulation, so as to charge them, upon failure to do so, with compound interest. *Ibid.* 325.

22. Generally, the court, upon a bill filed for the settlement of an estate, will rely upon the judgment of the master in the allowance of commissions to the executor or administrator; but if it appear that the rate of commissions has been passed upon and fixed by the County Court, the Court of Equity will follow that as the safer guide. *Ibid.* 325.

23. A sum paid to the widow of the testator by his executor, as, and in lieu of, the distributive share to which she became entitled by dissenting from the will, is not a disbursement, on the payment whereof the executor can claim a commission. *Ibid.* 325.

24. If an executor place the trust funds to his individual credit in bank along with his own, he cannot be said not to have used those funds, because he thereby increases his personal credit at bank; upon his death the funds become assets in the hands of his personal representative, and cannot be claimed as assets of the testator by a personal representative of that estate; they are liable to his creditors, and are, in all respects, his property; he being chargeable with the amount thereof, in account with his *cestui que trusts*. *Ibid.* 325.

25. An executor, who is chargeable with interest on the funds of the estate in his hands, will be charged with interest on his receipts, whether they be of principal or interest. *Ibid.* 325.

26. If the executor of a will in which a father has made bequests for the use of his children were, after the appointment of a guardian for the children, to cause such guardian to resign or be removed, for the fraudulent purpose of preventing his, the executor, being called to an account for the management of the estate, and of keeping the moneys thereof in his own hands, he would be held by the court to the most rigorous measure of accountability which the law would permit. *Ibid.* 325.

27. An executor is entitled to commissions on the interest accrued on his receipts and disbursements, or, which amounts to the same, to have the commissions calculated on the amount of the receipts and disbursements, as swollen by the interest added thereon. *Ibid.* 325.

28. An administrator is not entitled to commissions on the value of specific articles; though for his trouble and responsibility in respect to them, it is proper to have regard in estimating a proper commission on the receipts properly so called, that is to say, moneys. *Spruill* v. *Cannon*, 400.

29. If it appear that an administrator has not used the funds of the estate, and has not made any profit from them, he is not chargeable with interest, if the funds were not wantonly kept idle, but were kept for the purposes of the trust; and they shall be taken to have been so kept, when it appears that a bill was filed for the settlement of the estate, and the funds were kept ready to be paid over to the next of kin. *Ibid.* 400.

30. An administrator who is also one of the next of kin, is not chargeable with interest on a sum not exceeding his share of the estate, loaned out after he was ready to settle the estate, and kept a large amount on hand to be paid over to the other next of kin. *Ibid.* 400.

31. The court will so far rely upon the judgment of the master as to the proper rate of commission to be allowed an administrator, as to make it a general rule not to depart from it, except in a clear case of mistake by the master. *Ibid.* 400.

32. In a trial at law, on the plea of fully administered, the allowance of commissions to the executor or administrator, by the County Court, under the act of 1799, 1 Rev. Stat. ch. 46, sec. 29, is definitive and conclusive. But in a suit in equity, for the settlement of the testator or intestate's estate, the subject of commissions is incidental to the settlement of the executor's or administrator's accounts; and the court will consequently take cognizance of it, and correct an improper allowance of commissions made by the County Court. *Walton* v. *Avery*, 405.

33. In a suit in equity for the settlement of an executor's or administrator's accounts, though the *ex parte* order for the allowance of commissions made in the County Court is not conclusive, it is entitled to much respect, and it is not proper to vary it, unless it be founded on a mistake of the law, or the rate be clearly excessive. *Ibid.* 405.

34. Slaves inventoried by an administrator, and delivered over to the next of kin, are not "receipts" within the meaning of the act of 1799, so as to entitle the administrator to a commision on the value, even though they may have been recovered by him for his intestate's estate in a suit at law, though the trouble of managing them may properly be taken into consideration in estimating the commissions to be allowed on the receipts proper. *Ibid.* 405.

35. A set-off allowed by an administrator in reduction of a debt due the estate, is not such a "receipt" whereon the act of 1799 allows a commission. The balance is the true debt in the case of a set-off, and that balance is the receipt within the statute. *Ibid.* 405.

36. Bonds which were in the hands of the intestate as a trustee, and which his administrator delivers over to the true owner, is not a "disbursement" on which the act of 1799 allows a commission. *Ibid.* 405.

37. An allowance made in the County Court of 5 per cent. commissions to ad-

ministrators upon the receipts and disbursements of a large estate, reduced by the Court of Equity in a suit brought to correct such allowance, to 2½ per cent., where the administrators, under an arrangement with the guardian of the infant next of kin, paid over to him bonds, instead of collecting them and paying over the money. *Ibid.* 405.

38. Administrators are not to be charged with interest on money which they honestly retained, under an impression that it belonged to them, the same having been allowed them as commissions by an order of the County Court, especially when they interposed no delay in a suit brought in equity for the purpose of correcting the allowance. *Ibid.* 405.

39. An order of the County Court, passed before the administrator's accounts were made up and ready for settlement, fixing the rate of commissions to be allowed him, but without specifying any sum on which the commissions were to be calculated, nor giving the amount of them, is so loose that it ought to be reformed on that account. *Ibid.* 405.

40. If one, acting as executor under a supposed will in which he was interested beneficially as a residuary legatee, make an agreement with the surviving partner of his testator, in relation to the partnership concern, by which he surrenders to him a part of the effects of the concern, he will be responsible therefor, if the same be not for the advantage of the estate, to the administrator of the deceased, upon the recall of the probate of said will, although the administrator may have a remedy against such surviving partner. *Ralston* v. *Telfair*, 414.

41. An executor, acting under a supposed will in which slaves were directed to be emancipated, is not to be charged with the hires of such slaves, when they have been allowed to work for themselves, and the executor has made no profit from them. *Ibid.* 414.

42. It is not generally the duty of an administrator to volunteer in paying debts which his intestate has contracted as surety, and procuring assignments thereof to a trustee; and if, in pursuing this unusual mode of administration, he should happen to injure the estate committed to his charge, he would be obliged to show very special and sufficient reasons for his conduct, before he could exonerate himself; and therefore he cannot ordinarily be charged with a want of due diligence in prosecuting a claim against his intestate's principal, in not pursuing such a course. *Utley* v. *Rawlins*, 438.

43. Where an administrator has fully administered all the assets of an estate in his hands, he cannot be charged for not prosecuting a doubtful claim at his own costs, when the next of kin refused to incur the liability of costs. *Ibid.* 438.

44. An executor of a deceased partner, who has generally exhibited perfect integrity and zeal in the management of his testator's estate, shall not be charged with negligence in not filing a bill for an account and settlement against the surviving partner within two years after the expiration of the partnership, and until after the surviving partner had left the State, where it appears that the latter had been greatly trusted by the testator himself, was a man of unexceptionable character, and up to the time of his going away, was actively engaged in winding up the affairs of the concern, and no suspicion was entertained by any person of his integrity during that period. *Whitted* v. *Webb*, 442.

45. In a bill for an account by the legatees against the executor of a deceased partner, in which they seek to charge him for not collecting the amounts of certain decrees which he had obtained against the surviving partner, upon a bill taken *pro confesso* against him, if it appear that the decrees were erroneous, and the sums decreed therein too large, and the executor has in fact obtained from the surviving partner as much, or more than the amount properly due from him, the executor shall not be charged with the balance remaining unpaid on the decrees, and which cannot now be collected because of the insolvency of such surviving partner. *Ibid.* 442.

46. If an executor make a compromise for the estate of his testator, which is, as a whole, highly advantageous to it, he shall not be charged because, in a single particular, it is not so; for, being advantageous upon the whole, the estate must take it with its inconveniences as well as its benefits. *Ibid.* 442.

47. An executor is entitled to charge for actual expenditures incurred in the faithful discharge of his duty; and the expenses of attending sales in which the estate is interested, and of sending an agent out of the State to collect a debt of considerable amount, are of that character. *Ibid.* 442.

48. The Court will not disturb the commissions allowed an executor by the Master, though they were in part allowed on some items not the proper subjects of a commission, if the Master has reported the whole sum allowed for commissions to be reasonable, and, excluding from the account every item not properly the subject of a commission, the gross amount allowed will not exceed 5 per cent. on one side of the account. *Ibid.* 442.

49. Where claims against a partnership appear to have been unsatisfied at the death of one of the partners, the exhibition of the vouchers of payment by his executor, in a suit by the legatees against him, is *prima facie* evidence that he made the payment; though the mere production of the testator's notes by an executor does not establish payment by him, where it does not appear that the notes were unsatisfied at the testater's death. *Ibid.* 442.

50. In a bill by the legatees against the executor of a deceased partner, it is immaterial whether the partnership debts were paid by the executor of the surviving partner. They were charges upon the assets, and the plaintiffs are entitled only to the clear residue of these assets, after payment of the charges upon them. *Ibid.* 442.

51. The Court will not disturb the Master's allowance of commissions, because he has not allowed any on the disbursements, if it is satisfied with the *amount* allowed as a compensation for the executor's services. *Ibid.* 442.

52. The next of kin may sustain a bill against the executor of the deceased administrator of an intestate, for an account and settlement of the intestate's estate in his hands, as well as against the administrator *de bonis non* of such intestate. *Thompson* v. *McDonald*, 463.

53. Where an administrator dies, commissions may be allowed his estate for his services in managing his intestate's estate, though his executor set up an unconscientious resistance to the claim of the next of kin of the intestate. *Ibid.* 463.

54. Whatever respect a Court of Equity might feel itself bound to pay to an order of the County Court, settling the rate of an administrator's commissions, had it been made before the suit was instituted, it regards such

an order in relation to a matter under investigation before itself, as furnishing no criterion by which to regulate the proper allowance. *Ibid.* 468.

See ANSWER—APPOINTMENT, 2—COSTS, 4—CROPS—DECREE, 1—EQUITY, 6—HUSBAND AND WIFE, 1—RENT—RETAINER—TRUST, 3, 4—VENDOR AND PURCHASER, 2, 3, 4.

FRAUD.

A donee claiming under a voluntary conveyance from one who obtained his title by fraud and surprise, will be affected by the same equity which may be enforced against the donor. *Buffalow* v. *Buffalow*, 241.

See AGREEMENT, 1, 2, 3—ATTORNEY—VENDOR AND PURCHASER, 5, 6.

GUARDIAN AND WARD.

1. A trustee cannot claim from the *cestui que trust* immunity from the consequences of a breach of trust, or indemnity against pecuniary loss from it: Therefore where a guardian procured an order of Court for the sale of slaves belonging to his ward, and purchased them himself, and afterwards claimed them as his own, *it was held*, that he could not, upon the ward's becoming of age and recovering the slaves in a suit at law, obtain, in a Court of Equity, remuneration for his expenses in keeping and maintaining them. *Jennings* v. *Sykes*, 151.

2. There is no trust which can be reposed in one person over the property of another, in regard to the management, whereof a full and detailed account is more imperiously demanded, than in that which the law confides to a guardian over the estate of his ward. Hence where an alleged settlement is set up by a guardian as a bar to an account, and it is not seen that any account was stated, nor what were the matters embraced within the attempt to settle, and the guardian himself will not swear, that so far as it went the settlement was correct, but leaves the ward to make full proof if he can that it was not correct, it will be no bar to a full account from the guardian. *Graham* v. *Davidson*, 155.

3. Where an executor of an estate becomes guardian to the legatees, an account from the guardian necessarily requires an account from him as executor, for the purpose of ascertaining the funds which came or ought to have come to his hands as guardian. *Ibid.* 155.

4. Where one of two wards interested in the same estate makes a settlement with their guardian on behalf of himself and the other ward, the latter will not be thereby precluded from calling for a full account from the guardian, if he were not a party to the settlement. *Ibid.* 155.

5. Where one person was appointed guardian of A, and a second of B, and they executed a bond as the joint guardians of both wards, and the first guardian delivered over money and effects belonging to A, to the other, *it was held*, that the first was the sole guardian of A, and the other was but his agent for whose acts he was responsible; or that if the guardians were to be considered as joint for both wards, still the first was responsible for the acts of the other, upon the principle that where, by the act or agreement of one trustee, money gets into the hands of his co-trustee, *both* are answerable for it. *Ibid.* 155.

6. A father cannot appoint a guardian for his children, nor impose on any one the duties and obligations of that office, except "by deed executed in his life-time, or by his last will and testament, in writing," as prescribed by the act of 1762 (1 Rev. Stat. ch. 54, sec. 1.) *Peyton* v. *Smith*, 325.

7. Where it can clearly be collected from the will of a father, that certain persons are thereby appointed to have the custody of the persons and the estate of his children, until they arrive at age, such an appointment will be held to constitute them guardians, as though the appropriate term had been used. But where a term so well known, and of such universal use to describe the office, is not employed by the testator, there ought to be unequivocal indications of a purpose to confer the office, before the court will declare it conferred. Hence, a direction by a testator, that the use of his property shall be with his wife, for the support of her and the children, subject to the supervision of his executors, until a division of it can be conveniently made, either in kind or in the form into which the executors may convert it, between the wife and children, will not constitute the executors guardians of the children. *Ibid.* 325.

See LUNATIC, 1.

HEIRS.—See CROPS—EXECUTORS AND ADMINISTRATORS, 12—LAND.

HUSBAND AND WIFE.

1. Although the debt of the wife does not survive against the husband, unless reduced to a judgment during their joint lives, yet if the husband be the administrator of, or guardian to, the creditor, the debt is to be taken as having been received by him. *Lamb* v. *Gatlin*, 41.
2. Upon an account of the separate estate of a married woman between her and her husband's administrator, the latter is not entitled to credit for debts of the former paid by his intestate during the coverture. *Gee* v. *Gee*, 103.
3. By marriage, the husband acquires all the personal chattels of his wife in possession; and, as at law the possession of the *cestui que trust* is the possession of the trustee, so in equity the possession of the trustee is the possession of his *cestui que trust;* consequently, in equity the husband will be entitled to all the personal chattels of which his wife is the beneficial owner, and which are in the possession of her trustee. *Murphy* v. *Grice*, 199.

See EVIDENCE, 5, 6—PARTITION, 3, 5, 6.

ILLEGITIMATE CHILDREN.—See CHILDREN.

IMPLICATION.—See DEVISE, 2—EXECUTORS AND ADMINISTRATORS, 10, 11, 12.

INCUMBRANCE.—See LAND.

INDEMNITY.

1. Upon an agreement for an indemnity, the plaintiff has a right, without waiting for actual loss, to call on the defendant, in a Court of Equity, to indemnify him against impending injury, and, to that extent, enforce the specific execution of the agreement between them. But, before an actual loss sustained, the plaintiff can maintain no action at law upon the agreement. *Burroughs* v. *McNeil*, 297.
2. Where a bond of indemnity is in the hands of the defendant, the plaintiff has a right to go into a Court of Equity for an exhibition of it, and for such relief there as, upon its exhibition, may be deemed just; and this without any previous demand of the instrument. The want of such demand may affect the costs, but does not *per se* oust the Court of the right to decree its exhibition. *Ibid.* 297.

INFANT.—See PARTITION, 2, 3.

INJUNCTION.

1. Where two parties claim distinct interests in a note, and one claim is admitted and the other disputed by the maker, and a judgment is entered up for the amount of the first, upon an agreement that the defence to the last shall be in no way prejudiced thereby, a court of equity will not permit an execution to issue for the disputed claim, until its merits have been settled. *McNamara* v. *Irwin*, 13.
2. Where an answer admits the equity of an injunction bill, but sets up an avoidance of it, the injunction will be continued until the hearing. *Ibid.* 13.
3. A motion to dissolve an injunction may be made notwithstanding exceptions have been filed to the answer; and the motion for the dissolution and the exceptions will come on to be argued before the court together, when the court will not disregard the exceptions, but will look into them, and if found not to be frivolous, will give them due effect in repelling the defendant's motion. *Smith* v. *Thomas*, 126.
4. Upon a bill brought for an injunction and relief against a deed alleged to have been executed after marriage, but antedated, or if executed before marriage, to have been done in fraud of marital rights, allegations that the husband at the time of the marriage had a good estate, and that children were born of the marriage, are not material to the main points of inquiry, and an omission to answer them will not prevent the dissolution of an injunction on a motion made for that purpose. *Ibid.* 126.
5. If exceptions to an answer are well founded, they answer the motion for a dissolution of an injunction. But *per se* they ought not to have that effect. *Ibid.* 126.
6. Exceptions to an answer must be deemed well founded if the defendant submit to them; or, if upon a reference to the master, he report in favor of them, until the report be overruled by the court. But if the defendant do not submit, nor the plaintiff move for a reference of his own exceptions in time to get a report before the defendant has a right to move to dissolve an injunction, the defendant may make his motion notwithstanding the exceptions. *Ibid.* 126.

INTEREST.—See EXECUTORS AND ADMINISTRATORS, 7, 8, 20, 21, 25, 26, 29, 30, 38—TRUST, 6, 7.

JURISDICTION.

1. Where a plaintiff can have as effectual and complete a remedy in a Court of Law as that for which he invokes the aid of a Court of Equity—a remedy, direct, certain and adequate—the defendant may insist that this remedy shall be sought for in the ordinary tribunal. But this objection to the exercise of jurisdiction ought to be taken in due order and apt time; for, otherwise, if it be one which the party may waive, it will be deemed to have been waived, by failure to bring it forward to the notice of the Court *in limine*. Where the objection has not only not been taken in the pleadings, but the defendant has expressly submitted to the jurisdiction of the court, by praying of it to decide on the question of his liability, the objection must be regarded as one not of strict right, but addressed to the sound discretion of the Court. *Burroughs* v. *McNeil*, 297.
2. A defect of jurisdiction exists where courts of a *particular limited* jurisdiction undertake to act beyond the bounds of their delegated authority; or where a Superior Court of general jurisdiction passes upon subjects which,

by the constitution or laws of the country, are reserved for the exclusive consideration of a different judicial or political tribunal. *Ibid.* 297.

3. No consent of parties can confer a jurisdiction withheld by law, and the instant that the court perceives that it is exercising, or is about to exercise a forbidden or ungranted power, it ought to stay its action; and if it do not, such action is, in law, a nullity. *Ibid.* 297.

See ACCOUNT, 1—DIVORCE.

LAPSE OF TIME.

1. Where an administrator purchased a female slave at his own sale and accounted with the distributees for the price, and was permitted to hold the slave and her increase for forty years and upwards without any claim or demand from them, *it was held*, that if the reception of the price of the slave did not amount to a confirmation of the sale, yet acquiescence for so long a time would have the same effect; that such laches must deprive a party of all right to open what was apparently closed so long, whatever might be the subject of the transaction; and especially ought it to have that effect in the case of female slaves, from whom in the mean time a numerous progeny might spring. *Locke* v. *Armstrong*, 147.

2. The poverty of a party may account for his not bringing suit; but it cannot be a reason why he made no demand, nor made known his claim either to those against whom it was, or to any other person. *Ibid.* 147.

See MORTGAGE, 1, 6—WIDOW, 1.

LAND.

1. It is a general principle, where a sum of money is due in respect of land, and there is no contract of the terre-tenant, that the land alone is liable. *Jones* v. *Sherrard*, 179.

2. The terre-tenant of land, liable to encumbrance, must take care that such encumbrance does not accumulate to the injury of those who are to come after him; but in doing this, he is not bound to give any thing for the relief of the land, more than the rents, or actual annual value of the premises during his time. *Ibid.* 179.

3. A tenant by the curtesy must pay the whole interest during his life, but the arrear of interest which accrued during the life of the wife, is not chargeable to the husband, as a distinct item of interest after her death. During the coverture, the husband is not in of any estate of his own; but he and she are in as of the estate of the wife, the tenant in fee; and the owner of the fee may let the interest run in arrear at pleasure, and the whole will remain a charge on the estate, against which the heir has no equity to be relieved. *Ibid.* 179.

4. The proportion which a life estate ought to pay of a charge upon land, was formerly regarded as one-third of the amount; but that rule has more recently been disallowed; and it is now usually referred to the master to inquire what proportion of the capital the life estate ought to pay, regard being had to the rate and amount of interest, the annual value of the land, and the age, state of health, and habits of the tenant for life, estimated upon the principle of life annuities. *Ibid.* 179.

See CREDITORS, 1, 4—EXECUTORS AND ADMINISTRATORS, 10, 11, 12—PARTITION, 3, 4, 5, 6.

LEGACY.

1. A legacy of a negro "to be delivered after the death of my wife," vests in interest at the death of the testator. *Vaughan* v. *Dickens*, 52.

2. Generally a legatee cannot sue the debtor of the testator, it being the right and duty of the executor to collect all the debts; but where the executor was insolvent and manifestly under the power of the debtor, and that power was collusively exercised to the injury of the legatees, they may, in equity, have an account against the debtor. *Spack* v. *Long*, 60.

3. A legatee may, after an assent by the executor, file a bill to obtain his legacy—especially where he has no testimony of the assent, and the executor refuses to deliver it, and account for its profits. *Foscue* v. *Foscue*, 65.

4. A legacy to A of $2000, "or the value thereof in property," is a genera l legacy, and passes under the residuary clause of the legatee's will, in which he disposes of "all his personal estate of what nature soever, consisting of my undivided share in the negroes &c. coming to me from my father's estate, as well as all personal property I may have acquired since my father's death," although the legacy vested before that event. *Fagan* v. *Jones*, 69.

5. The right to a legacy or a distributive share is not within the act of 1826, 1 Rev. Stat. ch. 65, sec. 14, declaring that ten years time shall be a presumption of payment or abandonment of a right of redemption on a mortgage, and of *other equitable interests*. *Salter* v. *Blount*, 218.

6. A lapsed legacy of slaves will not pass under the residuary clause of a will giving "the residue or balance" of the testator's "money;" but will be a residuum of the testator's property, undisposed of by his will, and of course go to his next of kin. *Dicken* v. *Cotton*, 272.

7. A charge on a partial residue given in the will, operates for the benefit of the other legatees; but none of the legacies are to abate, unless the undisposed property should prove insufficient for the payment of debts. *Ibid.* 272.

8. Where a testator, after giving several pecuniary legacies in "dollars," proceeded as follows: "Item, I likewise leave all my lands and plantation to be sold by my executors, and pay five hundred to my brother N. S's children, to be equally divided; to them and their heirs forever. Item, I give and bequeath E. S. one thousand dollars, to him and his heirs forever. Item, and also all the residue of my estate to be sold by my executors, and all my just debts to be paid—those legacies to be paid off which I have already given away, and the balance, if any, to be equally divided between E. S." and others: *It was held*, that the word "five hundred" meant five hundred dollars, and was a legacy of that sum to the children of N. S.; and that the legacy was a general one. *Sessoms* v. *Sessoms*, 453.

See BEQUEST—SATISFACTION.

LIMITATION.

1. In a bequest of slaves by a testator to his married daughter, "to her and the heirs of her body, if any; if not, an equal division to be made between her husband and herself at her death, her part to return to the old stock," the limitation over of the wife's share is not too remote, but will take effect upon her dying without leaving children. *Watson* v. *Ogburn*, 353.

2. In a limitation of property to two sisters, and to the survivor upon the death of either without children living at her death, the word "children" means legitimate children; and if either of the sisters die, leaving illegitimate, but no legitimate, children, the whole property will go to the surviving sister. *Thompson* v. *McDonald*, 463.

2. If an estate be limited to two, and upon the death of one to the survivor, the interest or profits of a moiety of the estate during the life of the one first dying, do not pass over to the survivor with the estate, but belong to the representatives of the deceased. *Ibid.* 463.

See BEQUEST, 11.

LIMITATIONS, STATUTE OF.

A promise to settle an account is an admission of a subsisting liability, and an engagement to pay any balance which may, upon the settlement, be found due, and repels the plea of the act of limitation. *McLin* v. *McNamara*, 82.

See EXECUTORS AND ADMINISTRATORS, 2, 13, 14, 15.

LOST BONDS.

The owner of a single bill or bond for the payment of money destroyed by accident, may in equity recover the principal and interest due on it, upon tendering bond and security to the defendant to indemnify him against any liability that may afterwards arise concerning the said obligation. *Dumas* v. *Powell*, 122.

LUNATIC.

1. A Court of Equity will not entertain a bill against a lunatic by his guardian, for a settlement of the latter's accounts, and for payment of what may be found to be due to him from the lunatic; the proper method of proceeding in such case being by petition. *Tally* v. *Tally*, 385.
2. If a person maintain a lunatic for a number of years, without being appointed his guardian, he cannot sustain a suit in equity against the lunatic for the necessaries furnished; his remedy, if he have one at all, being by an action of assumpsit at law. *Ibid.* 385.

MARRIAGE SETTLEMENT.

1. The act of 1785, (Rev. Stat., ch. 37, sec. 30,) directing, upon marriage settlements, that provision shall be made for creditors, is confined to the estate and creditors of the husband. *Smith* v. *Garey*, 42.
2. A marriage settlement which directs the trustee, in the event of the wife dying without issue of the marriage before her husband, to transfer to him all her property excepting her land and slaves, and to convey them as she should appoint; in the event of the wife's surviving the husband, there being no issue of the marriage, *held* upon the recital and other parts of it, to create a trust of the land and slaves for her sole and separate use. *Gee* v. *Gee*, 103.
3. Clear proof of fraud or mistake is necessary to reform a marriage settlement, and in the absence of it the deed is held to be conclusive. *Ibid.* 103.
4. Slaves in the hands of an administrator, to a share of which a *feme sole* is entitled, it seems pass under the description, in a marriage settlement, of all the slaves of which she was possessed. *Ibid.* 103.

MASTER'S REPORT.—See REFERENCE AND REPORT.

MONEY SENT BY MAIL.

1. Where a vendor, in answer to an inquiry of his vendee how he would have the purchase-money sent, whether by mail or private hand, replied that he would leave it to the "better judgment" of the vendee, *it was held*, that the money, if sent by mail, was at the risk of the vendor. *Lamb* v. *Trogden*, 190.
2. Money sent by mail and taken out of the post office to which it was direct-

ed by one who had been requested by the party to whom it was sent to take out his letters, will, in a contest between him and his correspondent, be considered as having been received, though the person who took it from the office embezzled it. *Ibid.* 190.

MORTGAGE.

1. Where a slave, specifically bequeathed to a female infant, was mortgaged by the executor, it was held, that a lapse of forty years barred the right of the executor to redemption, and that the executor being barred, the legatee was also, notwithstanding her infancy and subsequent coverture. *Burkhead* v. *Colson*, 77.
2. If chattels specifically bequeathed be mortgaged by the executor, he is a necessary party to a bill by the legatee for a redemption. *Ibid.* 77.
3. A party having a mortgage on a slave, will not, at the instance of a subsequent purchaser, be prevented from foreclosing it, upon the ground that he had another fund out of which he might obtain satisfaction, if that fund had not in fact been assigned, but had only been agreed to be assigned to him by the mortgagor, and the person who held the fund was no party to such agreement. *Whitesides* v. *Williams*, 153.
4. A pretended absolute purchase of slaves, *held*, upon the proofs, to have been a conveyance to the defendant, as a security for the moneys by him advanced, and the liabilities by him incurred, in removing the incumbrance of an execution, which had been levied upon them;—and it was held further, that a pretended sale of the slaves by the defendant, as his own, after the death of the alleged vendor, and a purchase of them for him by his agent, did not, in any manner, affect the rights of the next of kin of the intestate vendor, in the equitable interest which he, the intestate, had therein at his death. *Hauser* v. *Lash*, 212.
5. A judgment creditor can only redeem upon the footing of shewing a good subsisting mortgage, which the mortgagor could go into a Court of Equity and redeem. The right of the creditor is founded originally on the idea of tacking, so that the mortgagor cannot redeem from him without paying both the mortgage money and the judgment debt. If, therefore, the mortgagor be excluded from the redemption, it cannot be open to his creditors; at all events, only under very special circumstances, if at all. *Tucker* v. *White*, 289.
6. A mortgagor, and consequently his judgment creditor, cannot, since the act of 1826, 1 Rev. Stat. ch. 65, sec. 14, redeem a mortgage, after the lapse of the periods therein mentioned, from the time when the right of redemption accrued, that is, in the case where no day of forfeiture was fixed, from the time when the mortgage was created. *Ibid.* 289.
7. Whether one can file a bill in the character of a judgment creditor of a person stated to be a mortgagor, for the purpose of being let in to redeem, without giving to, or admitting in, the mortgagee a good title. *Quere?* It would seem to be inconsistent with the scope and object of such a bill, to impeach the title of the person from whom the redemption is sought. *Ibid.* 289.
8. An instrument, purporting to be an absolute bill of sale for slaves, with a condition annexed that if the vendee be not "satisfied" with the slaves, or the slaves with him, the vendor may "redeem them at any time" by paying the amount of the purchase money, "or a negro girl to the satis-

faction of the vendee," is not, upon its face, a mortgage of the slaves. *Chambers* v. *Hise*, 305.

9. Where one took an absolute bill of sale for a slave for whom he paid a full price, and at the same time gave to the seller, on a separate paper, an instrument, promising that if the latter would, on some day in the ensuing month, "tender" to him the same price, he would "give" him the same slave; adding, "if failing to comply on that day, this shall no longer stand good against me;" and it did not appear that there was any mention then made of a mortgage, or that a loan was ever talked of, or contemplated between the parties, or that the vendor set up any claim to the slave, either as mortgagor, or in any other way, until ten years afterwards; *it was held* that the transaction was never regarded by the parties as a mortgage, but only as an agreement for a re-sale, of which the vendor had lost the benefit, by not complying with its terms. *Munnerlin* v. *Birmingham*, 358.

10. It is not usual now to decree the foreclosure of a mortgage simply; for it is almost always more beneficial to the one or other of the parties to sell the premises. It is not erroneous, however, to decree a foreclosure, when neither party asks the court for a sale. *Green* v. *Crockett*, 390.

See VENDOR AND PURCHASER, 7.

MULTIFARIOUSNESS.

Where one general right is claimed in a bill filed against several defendants, a demurrer for mulifariousness will not be available, although the defendants claim under several distinct titles. *Vann* v. *Hargett*, 31.

MULTIPLICITY.—See EQUITY, 1, 2.

NOTICE.

1. Information given to one about to purchase a tract of land, that a particular family has a claim to it, affects him with notice of the equitable claim of the wife to have the land settled to her separate use. *Pearson* v. *Daniel*, 360.

2. A purchase at an execution sale, against one who held in trust for the separate use of a married woman, *held*, upon the testimony of one witness only, supported by corroborating circumstances, against the positive denial of the defendant, to have been made with notice of the equitable claim of the wife, and upon an agreement to convey it to her use, upon being paid the amount of the debt due him for which the land was sold. *Ibid.* 360.

See TRUST, 1.

PARTIES.

1. To a bill against an agent, his principals are necessary parties. *Watson* v. *Ogburn*, 353.

2. The assignor is not a necessary party to a bill against an assignee, where it appears, from both the bill and answer, that all the interest of the assignor has been transferred. *Polk* v. *Gallant*, 395.

3. Where an assignment is absolute and unconditional, and leaves no remaining liability or right in the assignor which can be affected by the decree, the assignee need not make the assignor a party. But whether, if he be needlessly made a party, it is a valid ground of defence, *Qu?* But however this may be, if there remain any interest, right, or liability in the assignor, which can be affected by the decree—a *scintilla juris* even—then

he is a proper, and, in most instances, a necessary party. And therefore, a trustee holding for the separate use of a married woman, and for certain contingent trusts, will be a proper and necessary party in a bill by the married woman, although he has executed a deed purporting to assign his whole interest to her. *Thompson* v. *McDonald*, 463.

See CREDITORS, 2—EQUITY, 3—MORTGAGE, 2—WIDOW, 1.

PARTITION.

1. Land situate in two counties may, under the act of 1812, (1 Rev. Stat. ch. 85, sec. 7,) be sold for partition by a decree of the court of equity for either county. *In re Skinner's heirs*, 63.
2. Where all the heirs of a decedent join in a petition to sell his land, the purchaser acquires all their estate; and if some of them are infants, no day is given them to show cause against the final decree. *Ibid.* 63.
3. The proceeds of land sold for partition under the act of 1812, (1 Rev. Stat. ch. 85, sec. 7,) to which an infant is entitled, remain real estate, until the infant comes of age and elects to take them as money; and if the infant be a female and marry, and her guardian, to whom such proceeds had been paid by order of the Court of Equity, pay the same to her husband, upon her death they will descend as land to her real representatives, and this whether she married and died before or after she came of age; if in the latter case she never elected herself while sole to take such proceeds as money, nor consented, in the manner provided by law, after marriage, that her husband should so take them. *Scull* v. *Jernigan*, 144.
4. In a partition under the act of 1787, 1 Rev. Stat. ch. 85, sec. 1, the land is the debtor, and the sole debtor, for the charge of money made upon it for equality of partition; and if a note be given by the owner of the land to secure such charge, the land will still continue to be the primary debtor, and the note be regarded as a collateral security only. *Jones* v. *Sherrard*, 179.
5. Where there is a charge for equality of partition upon the wife's land, the husband or his surety will, if he has given a note for the sum charged, be relieved in equity by having the money raised out of the land to discharge the note, or the judgment which may have been obtained at law upon it, or to be reimbursed if he has paid it. *Ibid.* 179.
6. If the land of the wife, upon which there is such a charge, has, upon her death, descended to the persons to whom the money is payable, the husband, if he be not tenant by the curtesy, will be relieved in equity from the payment of a note given by him to secure the sum charged; but if, in such case, he be tenant by the curtesy of the land, the note will stand as a security only for the amount of the value of his life estate, and the interest accruing after his wife's death upon a capital composed of such value added to the interest accumulated during the wife's life, provided the annual interest upon such capital be no more than the annual profits of the land. *Ibid.* 179.
7. Where a deed of gift of slaves was made, and the donee at the same time executed to the donor a sealed agreement, in which he stipulated, that in a certain event he would divide the slaves mentioned in the deed of gift equally between himself and a grandson of the donor; *it was held*, that upon the event happening, the grandson was tenant in common with the donee of the slaves, and was entitled to a partition of them, and to have

an account of their hires and profits, and a decree for one-half of the same. *Parker* v. *Vick*, 195.

See PRACTICE AND PLEADING, 5.

PARTNERSHIP.

1. Without a special agreement, partners are not entitled to charge each other for services in relation to the partnership business; except where a partner is appointed an agent for a *special purpose*, in which case he may be entitled to the usual compensation in relation to such agency. *Philips* v. *Turner*, 123.
2. An account of profit and loss is indispensable to the settlement of a partnership. *Ibid.* 123.
3. One partner cannot be charged with all the debts of the firm, simply upon the ground that the books were in his possession, and without any evidence of any special undertaking that he would collect the debts. He should be charged with only what he collected. *McRae* v. *McKenzie*, 232.
4. Where no settlement or statement of company accounts between the partners appears, the interest of each partner in the funds is only an equal share after all debts are paid, and after each has accounted for what he has already received. This, therefore, involves the taking all the accounts of the partnership, as well of the debts it owed as of those owing to it, and every thing else material to stating a proper profit and loss account; for it is only such balance as may appear upon that account, that is to be divided between the partners, and carried to their respective accounts in the books, and thereby show how they stand towards each other. Therefore, the report of the master, upon a reference to him to state an account of the partnership, merely ascertaining the debts due to the firm, and dividing them equally between the partners, will be erroneous. *Ibid*, 232.
5. Where a partnership is dissolved, and one of the partners retires, and the remaining members form a new co-partnership under the same name and style, and afterwards a note is given in the name of the firm, by one who was the active partner in both concerns, it will not be presumed to be for an outstanding debt of the old, instead of a debt of the new firm, without some evidence of the fact. *Chaffin* v. *Chaffin*, 255.
6. And the master, in stating an account of the debts of the new firm, is not bound to state an account between the two concerns, when the parties do not furnish him with any *data* on which to found it, and the books do not show that there were any dealings between them. *Ibid.* 255.
7. A note given to a retiring partner, after the dissolution of an old and the formation of a new firm, by the remaining partners in the same name, is *prima facie* the debt of the new and not of the old firm; and if the partner who gave it were the active partner in both concerns, this presumption is strengthened by the fact, that by giving such note, he binds himself to pay a larger proportion of the debt. *Ibid.* 255.
8. A settlement by one, of his accounts with a co-partnership, will not be presumed to include his accounts with an individual member of the firm. *Ibid.* 255.

See EVIDENCE, 1—EXECUTORS AND ADMINISTRATORS, 40, 44, 45, 49, 50.

POSSESSION.

Every possession held for the owner of property and in assertion of his

claim of dominion, being an application of the property to the service of the owner, is the possession of the owner by his agent, curator or bailee. *Murphy* v. *Grice*, 199.

POWER.—See APPOINTMENT—EXECUTORS AND ADMINISTRATORS, 10, 11, 12.

PRACTICE AND PLEADING.

1. When a plaintiff alleges that he has never seen an original deed against which he seeks relief, and prays that the same may be produced for his inspection, the defendant is not bound to make the deed part of his answer, or annex it to it. The plaintiff must, in such case, obtain an order from the court for the production of the deed, which order, if disobeyed, will put the defendant in contempt, and of consequence prevent him from making any motion in the cause. *Smith* v. *Thomas*, 126.
2. If, upon a bill for an account, an agreement be set up by the defendant as a bar to the account, the plaintiff cannot impeach the agreement as unreasonable and one not proper to be executed, without filing a supplemental bill and distinctly putting its fairness in issue. *Lamb* v. *Trogden*, 190.
3. The objection, that an agreement is void because not reduced to writing, cannot avail a party, unless he sets it up in the pleadings. *Lyon* v. *Crissman*, 268.
4. When the depositions of the witnesses in an equity suit, transmitted to the Supreme Court for hearing, are in such direct conflict with each other that it is evident perjury has been committed, but the court cannot tell on which side the guilt lies, it will direct feigned issues to be made up and tried in the Superior Court, where the witnesses may be personally examined in open court, instead of empannelling a jury before it, the Supreme Court, under the special authority conferred upon it for that purpose, where such personal examination cannot be had. *Witherspoon* v. *Dula*, 279.
5. In a petition for the partition of land, or for the sale of it, for that purpose, under the act of 1812, (1 Rev. St. ch. 85, sec. 7,) if the statements as to persons entitled to the land and their respective shares therein, be not sufficiently precise and distinct, the Court will direct a reference to the Clerk and Master, for the necessary inquiries as to the interests of the parties. *Wooten* v. *Pope*, 306.
6. The court will not decide an exception relating to a matter solely between two of the defendants; particularly where the exception is stated to have been taken to avoid a conclusion between them by the report. *Spruill* v. *Cannon*, 400.
7. The court will not direct an inquiry as to matters not put distinctly in issue by the pleadings, and with regard to which there are no proofs. *Utley* v. *Rawlins*, 438.
8. Where an instrument, under which the plaintiffs claim, is set forth in their bill, if the defendants wish to avail themselves of the defence that the instrument does not, by the laws of the foreign country where it was executed, operate to convey the interests which it purports to convey, they ought, in fairness, to raise that defence upon the record, so as to put the fact in relation to that law distinctly in issue; and although, if they do not admit the fact in their answer, they will not be precluded from denying it, yet the court will not expect the same plenary proof in relation to

it, or draw the same inference from scantiness of proof, as if the pleadings had shewn that it was a material fact directly controverted between the parties. *Thompson* v. *McDonald*, 463.

See Account, 3—Amendment, 1, 2—Injunction, 3, 5, 6.

PRESUMPTION OF PAYMENT.—See Legacy, 5—Widow, 1.

PRINCIPAL.—See Agent and Principal—Surety and Principal.

PURCHASER.—See Vendor and Purchaser—Assignment—Execution.

REFERENCE AND REPORT.

1. Upon a reference by consent to the master to state an account, and in doing so to set forth certain facts, an omission to set them forth will furnish no objection to the report, if it appear that they are not necessary for the determination of the matters arising on the pleadings. *Graham* v. *Davidson*, 155.
2. It is no ground of exception to a master's report, that he has not acted upon matters not embraced in the reference. *Chaffin* v. *Chaffin*, 255.
3. It is objectionable for the master, upon a reference made to him, to decline passing upon any claim brought before him, and submitting its validity to the Court. He should decide, according to his best judgment, upon all the matters of mutual claim and discharge brought before him, and report his final conclusion thereon, affording to the parties an opportunity of having that judgment reviewed for error upon specific exceptions. *Burroughs* v. *McNeil*, 297.
4. If the master allow items in an executor's or administrator's account, without vouchers therefor, and do not state the evidence upon which the allowance is made, the items will, upon an exception taken to them, be again referred to the master, that he may revise them and set forth the grounds of his allowance, so that the court may be enabled to decide upon the correctness of his judgment. *Peyton* v. *Smith*, 325.
5. It is not a fit matter of exception to a report, that one of the two commissioners who united in, and signed it, afterwards altered it without the privity of the other. If the objection be true, in point of fact, the party should verify it on affidavit, and apply to have the whole report set aside, or restored to its first form. *Ralston* v. *Telfair*, 414.
6. A commissioner, by reporting an account annexed to the defendant's answer to be correct, adopts it as *his* account. *Whitted* v. *Webb*, 442.
7. The master in reporting upon an administrator's account referred to him, should state what he deems a reasonable commission for the administrator; and if he do not, the court will, if it deem it necessary, recommit the report for his revisal in that particular. *Thompson* v. *McDonald*, 463.
8. If a claim be right in principle, but the party omitted to advance it before the master, and it does not appear that in fact there is any ground for it, or if there be, it is very inconsiderable, the court will not recommit the report on account of it. *Ibid*, 463.

See Account, 3—Partnership, 4, 6—Practice and Pleading, 5, 6, 7.

RENT.

Where a tenant for life demises the premises, and dies before the rent is due, his administrator is not entitled to any part of it. *Gee* v. *Gee*, 103.

See Widow, 2.

RESIDUE.

If an executor have a balance of the residuary estate in his hands, and

waste it and become insolvent, the loss must fall on those entitled to the residue, and not on those for whose benefit a particular sum was directed to be raised. *Cloud* v. *Martin*, 274.

See LEGACY, 4, 6, 7.

RETAINER.

1. If the same person be executor of one, and the administrator of the other, of two partners, he cannot retain the assets of the latter to satisfy the claim of the former, arising out of the losses of the firm, in preference to the specialty creditors of the latter; because the claim of the former is but a debt by simple contract. Nor can he be made accountable to the legatees of the former for not retaining against the simple contract creditors of the latter, when the books of the firm did not shew, and he had no other means of knowing, that the firm had sustained losses and was insolvent before it was settled. *Chaffin* v. *Chaffin*, 255.
2. Whether one, who is executor of one person and administrator of another, can retain the assets of his intestate to the full amount of a debt due to himself from such intestate's estate, in preference to a claim of equal dignity against such estate due to his testator, or whether the assets should be applied in whole or in part to the debt due to the estate of his testator, *Quere? It seems*, that in such case he would not be permitted to take care of himself to the exclusion of his testator's estate; but that he should divide the assets rateably beween himself and such estate. *Ibid.* 255.

SATISFACTION.

1. A legacy is not taken as a satisfaction of a debt due the legatee, there being assets to pay both the debt and legacy, if there is a difference in their natures, or in the time when they are payable, or when one is certain and the other contingent. *Day* v. *Williams*, 66.
2. Whether declarations of a testator to prove a legacy to be in satisfaction of a debt are admissible. Qu? *Ibid.* 67.

SEPARATE ESTATE.—See BEQUEST, 5—EVIDENCE, 5, 6—HUSBAND AND WIFE, 2—MARRIAGE SETTLEMENT, 2.

SET OFF.

1. A counter demand in the nature of a set-off, cannot be allowed as such, unless it is mutual. *Bunting* v. *Ricks*, 130.
2. A claim set up as a counter demand cannot be allowed as a set-off, where there are no allegations upon which it can be seen that the plaintiff is legally responsible for that sum. *Ibid* 130..

SLAVES.—See AGENT AND PRINCIPAL.

SPECIFIC PERFORMANCE.

A decree for a specific performance cannot be obtained upon a bill against one of several heirs. *Hodges* v. *Hodges*, 72.

SURETY AND PRINCIPAL.

1. Between the creditor and a surety, the former is not bound to active diligence to protect the latter; but if by his act he deprives him of a security, the latter is *pro tanto* discharged; and where, upon an appeal from the County to the Superior Court, the judgment was affirmed, and execution issued against the defendant and the sureties to the appeal bond, and was levied upon property of the principal debtor sufficient to satisfy it, and the plaintiff discharged the levy, he discharges the sureties. *Cooper* v. *Wilcox*, 90.

2. The rights of a surety to protection are recognized in all courts, if his character as a surety can be averred; as at law, in cases between the holder and drawer of a bill, if the former release the acceptor he thereby discharges the latter. *Ibid.* 90.

3. A surety is entitled to the benefit of every additional or collateral security which the creditor gets into his hands for the debt for which the surety is bound. As soon as such security is created, and by whatever means, the surety's interest in it arises; and the creditor cannot himself, nor by collusion with the debtor, do any act to impair the security, or destroy the surety's interest in it. Therefore where a judgment was obtained against a principal and surety, and an execution was, at the instance of the surety, levied upon land of the principal sufficient to discharge the debt, *it was held*, that the creditor could not, to the injury of the surety, discharge the levy so as to let in another debt of his own, much less could he assign the judgment to another person to enable him, by discharging the levy, to save a debt to the prejudice of the surety. *Nelson* v. *Williams*, 118.

4. In favor of sureties, a security stands upon the same footing with a payment. If the principal direct a fund to be applied to the payment of a debt for which the surety is bound, the creditor cannot, for his own advantage, change the application to another debt. As respects the surety the debt is paid. *Ibid.* 118.

5. So, if the debtor gave the creditor a mortgage as a further security for a debt, for which a surety is before bound, the creditor cannot for any purpose of ease to the debtor, or of advantage to any third person or to himself, surrender the mortgage, or divert the mortgaged property to another purpose. The creditor was not bound to be active in obtaining the mortgage, but once accepted, he must keep it on foot for the benefit of the surety as well as himself. *Ibid.* 118.

6. It is the same with securities not provided by the debtor, or obtained against him *in invito*. If the creditor take judgment against the principal and release it, the surety is of course discharged. *Ibid.* 118.

7. The sureties of an insolvent clerk of a court, upon a breach of trust by their principal, will in equity be entitled to all the remedies and securities that were in the power of the *cestui que trusts*, or creditors, against one who co-operated in the breach of trust, and this even before they have paid to the *cestui que trusts* or creditors, the amount misapplied by their principal. *Bunting* v. *Ricks*, 130.

8. If there be several sureties for the same principal, and one of them be fixed with the payment of the whole debt, or of more than his rateable part thereof, the others, who are solvent, shall be compelled to contribute, in order to equalize the loss. But if by any agreement between the sureties, one of them is released by the creditor, upon his securing the payment of a certain part of the debt, he shall not afterwards be called upon to contribute to one or more of the remaining sureties, for a loss arising from the deficiency of another of them. *Moore* v. *Isley*, 372.

9. One of three joint solvent sureties cannot sustain a bill against either of his co-sureties for contribution out of a fund alleged to have been received by that surety for his indemnity from the estate of an insolvent co-surety, without making the other a party. *Ibid.* 372.

10. While the relation of joint sureties exists, funds received by one of them, (except under special circumstances,) for the discharge of, or as an indemnity against, his liability, are to be applied for the common benefit of the sureties. But after that connection has been severed by an agreement among the sureties, each of them has his distinct and several claim to prosecute, because of what he has paid for his principal, or for an insolvent joint surety; and the others have no right to demand participation in what his diligence may enable him to procure, while thus prosecuting his several claim. *Ibid.* 372.

11. The sureties for the payment of the purchase money of land sold by the Clerk and Master, under a decree of the Court of Equity, where the title is retained until the purchase money shall be paid, have a right, upon the insolvency of their principal, before the payment of the debt, to file their bill to restrain the conveyance of the land, and to have it applied to their relief, even though the principal has assigned his interest in it to another person without notice, for the purpose of discharging a debt *bona fide* due to him. *Green* v. *Crockett*, 390.

12. It is only the honest purchaser of a legal title, whom equity will not disturb. If the purchase be of the legal title, but with notice of an equity in another; or if it be only an assignment of an equity, with or without notice of a prior equity in another person, in either case the estate must, in the hands of the purchaser, answer all the claims to which it would have been subject in the hands of the vendor. Therefore, the sureties of a purchaser of land at a sale made by the Clerk and Master, under a decree of the Court of Equity, where the title is retained until the purchase money shall be paid, have a right, upon the insolvency of their principal before the payment of the debt, as against one purchasing from him *bona fide*, and without notice of the non-payment of the purchase money, to have the land sold for their reimbursement, if they have paid the debt, or for their exoneration, if they have not yet paid it. *Polk* v. *Gallant*, 395.

13. If a note, discounted at bank for the benefit of a principal, with three sureties, be discharged at maturity by the proceeds of another note, discounted with only two of the sureties, the third having died before the first note fell due, the estate of the latter will not be liable to contribute, upon the insolvency of the principal, and the payment of the renewal note by the sureties thereto, although when they executed it, they supposed the estate of the deceased would be liable upon it. *Hutchins* v. *McCauley*, 399.

See PARTITION, 5, 6.

TENANT BY THE CURTESY.—See LAND, 3.

TENANT FOR LIFE.—See LAND—RENT.

TENANT IN COMMON.

One tenant in common has a right to charge his co-tenant with a just proportion of the expenses incurred in relation to the common estate. *Peyton* v. *Smith*, 325.

TRIAL BY JURY.—See PRACTICE AND PLEADING, 4.

TRUST.

1. Much less than actual or particular knowledge in detail is sufficient to convert a person into a trustee, who co-operates with a dishonest trustee in an act amounting to a breach of trust. If any thing appears calculated to excite attention or stimulate inquiry, the party is affected with know-

ledge of all that the inquiry would have disclosed. Hence one who assists an officer of a court in misapplying the proceeds of an ordinary negotiable note held by the officer in trust for others, will be affected with notice of the breach of trust, although he was ignorant of the character in which the officer held the note, if he knew that it was given for property sold by a commissioner under an order of the court. *Bunting* v. *Ricks*, 130.

2. Where a bill alleged that, at an execution sale of the lands of the plaintiff's deceased father, a certain person, by representing that he was purchasing for the plaintiffs, prevented competition, and thereby obtained the lands at an under value, and afterwards sold the same to the defendant, who pretended that he was buying for the plaintiffs, but afterwards refused to acknowledge the trust, and convey the land to them, *it was held*, that, upon its appearing from the proofs that the purchaser at the execution sale did not in fact buy the lands for the plaintiffs, but *bona fide* for himself, it was not necessary to consider whether the defendant bought upon any trust, and if so, upon what trust, for the plaintiffs; for that, unless the facts proved agreed with those alleged, the plaintiffs could not have any decree, and the foundation of their claim, as alleged, was an original purchase in trust for them by the purchaser at the execution sale, and a devolution of *that trust* upon the defendant. *Foster* v. *Jones*, 201.

3. If property be conveyed by deed to a trustee for certain purposes, and he join in the execution of the deed by signing and sealing the same, and expressly covenant therein for the performance of certain acts, a breach of trust by him will create a debt by specialty to the *cestui que trusts;* and, *it seems*, it would, were there no express covenant on his part to perform the duties imposed by the deed; but if he only accept the deed without joining in its execution, by signing and sealing it, a breach of trust by him will be only a simple contract debt; and in the administration of his estate on his death, such debt will be postponed to debts by specialty. *Benbury* v. *Benbury*, 230.

4. Where a trustee misapplies the trust funds and dies, the *cestui que trusts* will, in equity, be entitled to have such assets of his estate as are not covered by debts of superior dignity, laid out or settled, under the direction of the court, to the purposes declared in the deed of trust. *Ibid.* 230.

5. Courts of Equity view with jealousy contracts made by a trustee with his *cestui que trusts*, as, for instance, a purchase by an administrator, of his distributive share, from one of the next of kin. But whether the purchase in any particular case ought to stand, is exclusively a matter between the parties to the contract. As to all others, it must be understood as transferring the right which it professes to sell; and the price paid by the purchaser is a matter which concerns none but the parties. If not made for the other next of kin, they can take no benefit from it. *Peyton* v. *Smith*, 325.

6. It is a general rule that a trustee shall not be allowed to retain to himself profits made upon the use of the property of his *cestui que trusts*. These profits are in the nature of fruit and increase, and belong of right to the owners of the property. It is seldom practicable, however, to ascertain with precision, when trust funds have been misapplied, the exact gains therewith made, and therefore it has been found necessary to adopt a general rule, which substitutes as the measure of profits what the law or the

usage of the country regards as the ordinary fruit or produce of capital. *Ibid.* 325.

7. Where the breach of trust is accompanied with corruption, and there is reason to believe that the general rule is an inadequate measure of the wicked gains actually made, the court may, and sometimes does, direct rests in taking the accounts, so as to render the trustee chargeable with compound interest. *Ibid.* 325.
8. Where a trustee withholds from his *cestui que trusts*, for many years, a reasonable explanation in regard to the custody and management of their money, it is to be taken that he has not actually and *bona fide* kept it for their benefit. *Ibid.* 325.

See BEQUEST, 12—COSTS, 1, 3—GUARDIAN AND WARD, 1, 5—SURETY AND PRINCIPAL, 7.

TURNPIKE COMPANY.—See ACCOUNT, 2.

VENDOR AND PURCHASER.

1. Although payment of the purchase-money, taking possession, and making improvements, will not entitle the vendee to the specific performance of a parol agreement for the sale of land, yet he has, in Equity, a right to an account of the purchase-money advanced, and the value of his improvements, deducting therefrom the annual value during his possession. *Albea* v. *Griffin*, 9.
2. The act of 1797 (1 Rev. Stat. ch. 46, sec. 28,) empowering executors and administrators to convey land in certain cases, is confined to sales of land for which the vendor had executed a bond with a condition to convey, and had died before performance. It does not exend to agreements to convey made upon other considerations, nor to a case where a deed was executed in performance of the condition, and lost after the death of the vendor, and before its registration. *Hodges* v. *Hodges*, 72.
3. The loss of a deed after the death of the vendor, and before its registration, can only be supplied by a decree directing the heir or devisee to execute another. *Ibid.* 72.
4. Under the act an executor is not compelled to execute a deed, unless the vendor, or his heir or devisee, would be bound to a specific performance; any defence to the latter, as want of consideration, &c., is available to the former. *Ibid.* 72.
5. If one, in whom a drunken man confides, takes advantage of that confidence and obtains from him an absolute conveyance for land, at an undervalue, with a special engagement for a re-sale and re-conveyance, upon hard and unreasonable terms, the contract will be set aside, and a re-conveyance decreed, upon the re-payment of the amount really due from the vendor to the vendee. *Morrison* v. *McLeod*, 221.
6. Where an absolute conveyance was made of land worth $3,000, for the expressed consideration of $2,000 then paid, but in fact only $500 was paid in cash, and the vendee's note given for the payment of the balance in four annual instalments without interest, and at the same time the vendee executed to the vendor an instrument in the form of a bond in the penal sum of $500 only, for the re-conveyance of the land upon the payment by the vendor to the vendee of the said sum of $2,000, with interest thereon from the date, at any time within *three* years; and that the former and his family might retain possession during the three years of so much of said

land as might be necessary for them to cultivate; and just before the expiration of the three years, the parties executed another instrument in relation to said land, in which it was agreed, among other things, that the vendor might remain in possession one year longer, and that during that period, both parties, by mutual consent, would be permitted to sell said land; and if it should not be sold before the end of that time, "then *one* of the parties should sell *his interest* in said land to the *other*:" *It was held*, that the conveyance, though absolute in form, was intended by the parties to be but a security for the re-payment of money advanced, or to be advanced by the vendee to the vendor; and that the latter, upon the re-payment of the sum really due from him to the former, should be permitted to redeem the land. *Ib.* 221.

7. The doctrine of the vendor's equitable lien, arises only in a case in which the estate has been conveyed by the vendor. If he retain the legal estate, or, after conveying it, if he receive it back by way of mortgage, he then has not a lien on the estate, but the estate itself; and the title thus withheld by the vendor is precisely analogous to a mortgage made to him. *Green* v. *Crockett*, 390.

See NOTICE.—SPECIFIC PERFORMANCE.

VOLUNTARY CONVEYANCE.—See FRAUD.

WASTE.

It is essential to a bill to stay waste, that a good, and not a doubtful title to the place wasted, or in which the waste is apprehended, should be shewn. Equity will not interfere for that purpose, where, by possibility, the plaintiff's claim, now confessedly uncertain, may turn out upon evidence hereafter to be discovered, to cover a part of the land in which it is said the waste is contemplated. *Hough* v. *Martin*, 379.

WIDOW.

1. An allotment of personal estate made to a widow upon her dissent to her husband's will, by a jury under the provisions of the act of 1784, (Rev. St. ch. 204,) gives her at least a *prima facie* warrant to exact payment of the amount, and after the lapse of thirty years a payment will be presumed; and if a legatee file a bill for an account against the executor, in which he designs to impeach the validity of the assignment to the widow, she ought to be made a party, so that she may sustain it, and if she cannot sustain it, that she may be made liable in the first instance for what has been improperly received under it. *Graham* v. *Davidson*, 156.
2. One-third of the rents of land in which a widow is entitled to dower, in Equity belongs to her or her representative. *Peyton* v. *Smith*, 325.

WILL.

1. The dissent of the widow from the will of her husband, although it may defeat some arrangements made in the will, does not affect its construction. *Manning* v. *Woff*, 12.
2. Persons claiming under an instrument cannot have relief under a bill setting up the instrument as a deed, if it be simply a will. And *it seems*, an instrument cannot be set up as a will or testament by a bill in equity, but must be brought forward in the proper tribunal, and there proved as a will. *Thompson* v. *McDonald*, 463.

See DEED, 1.

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